United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

226

Nos. 24,723, 24,724 & 24,725

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARINO J. MATURO,
LOUIS P. VECCHIARELLO,
ANTHONY P. VECCHIARELLO,

Appellants.

Consolidated Appeal
from the United States District Court
for the District of Columbia

CONSOLIDATED BRIEF AND APPENDIX FOR THE APPELLANTS

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INDEX

TABLE OF AUTHORITIES CITED

Cases:

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* Cases chiefly relied upon by Appellants.

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* Cases chiefly relied upon by Appellants.

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* Cases chiefly relied upon by Appellants.

Page

Statutes:

Miscellaneous:

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BRIEF FOR THE APPELLANTS

ISSUES PRESENTED*

In the opinion of the appellants, the following issues are presented:

1. Whether the denial of appellants' Motion for Severance by the Trial Court was reversible error?

2. Whether appellants were denied the effective assistance of counsel, guaranteed under the Sixth Amendment to the Federal Constitution?

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* This case has not previously been before this Court, except on application for release on bond pending appeal.

3. Whether the appellants were denied a fair and impartial trial guaranteed under the Fifth Amendment to the Federal Constitution, by reason of the following:

(a) The bias of the trial judge;

(b) The denial of appellants' motion for change of venue;

(c) The refusal of the Trial Court to take judicial notice of the reciprocity agreement between the United States and Mexico;

(d) The Trial Court permitted the Government to suppress evidence beneficial to the appellants;

(e) The failure of the Trial Court to fully instruct the jury on the law applicable to the evidence adduced, and

(f) The Trial Court failed to grant appellants' Motion for a Mistrial.

REFERENCES TO RULINGS

1. Refused to take judicial notice of the reciprocity agreement between United States and Mexico. (Tr. 833-834).

2. Denial of all motions made by defendants. (Tr. 862).

3. Failed to properly instruct the jury on the law applicable to Forgery and Uttering. (Tr. 1022-1025).

4. Failed to properly instruct the jury on the law of circumstantial evidence. (Tr. 1001).

STATEMENT OF THE CASE

Appellant, Marino J. Maturo was convicted of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 19, 20, 21, 22, 23, 24, 25, 26, 28, 30, 31, 32, 33, 34, 35, 36 and 37 of a Thirty-seven Count indictment charging Wire Fraud (18

U.S.C. 1343), Mail Fraud (18 U.S.C. 1341), Uttering Forged Documents (22 D.C. Code 140) and Aiding and Abetting (18 U.S.C. 2 and 22 D.C. Code 105).

Appellant Louis P. Vecchiarello was convicted of Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37 of the same Thirty-seven Count indictment.

Appellant Anthony V. Vecchiarello was convicted of Counts 1, 2, 3, 4, 5, 6, 7, 9, 11, 15, 19, 20, 21, 22, 23, 24, 35, 36 and 37 of the same Thirty-seven Count indictment. (App. pp. 7-13).

Appellants, Louis P. Vecchiarello, Marino J. Maturo and Anthony V. Vecchiarello, were sentenced to serve up to five years.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED

Prior to and during the trial, appellants moved the court for a severance pursuant to the provisions of Rule 14 of the Federal Rules of Criminal Procedure, but the Trial Court denied the said motion on each occasion. (Tr. 606-607 and 826).

Counts 14, 16, 17 and 18 of the indictment were dismissed by the court during the progress of the trial. (Tr. 823).

The appellants were pressured into signing stipulations which dispensed with the Government's necessity of calling a multiplicity of witnesses and identification of official documents. (Tr. 782, 789, 791, 793).

The Trial Court refused to take judicial notice of the reciprocity agreement between the United States and Mexico. (Tr. 833-834).

Upon the return of the indictment, wide publicity was given the case in the newspapers circulating on the eastern coast. The appellants moved for a change of venue pursuant to the provisions of Rule 21(a) of the Federal Rules of Criminal Procedure. The said motion was denied by the Trial Court initially and upon its renewal. (Tr. 33, 824).

During the trial and upon post trial motions, the trial judge was challenged for bias but the latter refused to excuse himself. (Tr. 862).

The charges of bias included the court's pronounced impatience with motions made by counsel for appellants, denying such motions before fully made by counsel. (See the minutes.) The trial judge sought to dissuade co-counsel from representing the appellants with the statements that no future political backing would be accorded counsel and that he would not be paid by the defendants. (See the minutes.) The trial court, in its charge to the jury, indicated bias in its text. The court charged the jury at the conclusion of the case, and on two occasions thereafter, he recalled the jury and issued new charges, explaining to them that he had forgotten to charge them earlier on such issues. However, at this time the court re-read to them Counts 25-37 of the indictment. Thereafter, on the following day of jury deliberation, the court again recalled the jury with the intent excuse and proceeded to further charge the jury. The foregoing additional charges addressed themselves to the guilt of the appellants.

At the conclusion of the Government's case, counsel for appellants moved for a dismissal and renewed all of the motions heretofore made by appellants.

In the motion to dismiss, counsel levelled their attacks, first upon Counts 1 through 28, as alleging 28 separate crimes and that all are part and parcel of one scheme, divided up in each small step, so that they cannot become 28 or 27 separate offenses.

Defense counsel conceded that each mailing or each use of the wire could be a separate offense, but insisted that a conspiracy or scheme cannot be employed for such purposes. In other words, only two offenses were charged in the foregoing Counts. (Tr. 826).

Defense's motion further charged that the Counts embodying forgery and uttering were without support in the evidence. That there was no evidence that the instruments had been forged. (Tr. 827). The Trial Court at this point denied all motions offered by the defendants. (Tr. 829).

Thereafter, the defense rested their cases without offering any evidence in their respective defenses.

Thereupon, defense counsel renewed their several motions, and again the Trial Court ruled that: "The motions made on behalf of all defendants will be denied." (Tr. 862).

The court thereafter charged the jury and, in so doing, read to the jury the statutory provisions relative to 18 U.S.C., Sections 1343, 1341 and 2, together with Title 22, Sections 105 and 1401 of the D.C. Code. (Tr. 1003-1004).

The jury began deliberation at 3:28 P.M. on June 15, 1970 and was recalled 5 minutes later, at 3:33 P.M. for further instructions on the offenses of Forgery and Uttering. The court, however, failed to instruct the jury that when the offenses of Forgery and Uttering are committed by one and the same person, only the single offense of Forgery is committed.

Such an instruction was most pertinent, since the indictment charged only the offense of Uttering. (Tr. 1022-1025).

Thereafter, appellants, through their present counsel, seasonably filed a Motion for New Trial and in Arrest of Judgment, which was denied by the Trial Court. That after the appellants were sentenced as hereinabove described, the appeal herein was perfected and consolidated.

ARGUMENT

I

THE DENIAL OF APPELLANTS' MOTION FOR SEVERANCE, BY THE PRETRIAL JUDGE, DEPRIVED APPELLANTS OF DUE PROCESS OF LAW, ESPECIALLY WHERE THE PROSECUTION WAS CONDUCTED UNDER A THIRTY-SEVEN COUNT COMPLICATED INDICTMENT.

Rule 14 of the Federal Criminal Rules provides that: "If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of

defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the attorney for the Government to deliver to the court for inspection *in camera*, any statements or confessions made by the defendants which the Government intends to introduce in evidence at the trial."

Appellants contend that the Trial Court committed prejudicial error in failing to grant them severance from each other, as prayed in their Motion for Severance. (App. pp. 15-16).

Counts 1 through 8 of the Thirty-seven Count indictment charged each defendant with Wire Fraud, Counts 9 through 28 charged Mail Fraud, and counts 29 through 37 charged Passing and Uttering Forged and False Documents. A total of 37 crimes, each.

The law is well settled that where it appears that a defendant will not receive a fair trial without a severance when all of the circumstances are considered in the light of sound judgment and common sense, then severance must be granted. *Dauer v. United States*, 10 Cir., 189 F.2d 343 (1951), cert. denied, 342 U.S. 898.

In the case of *Gregory v. United States*, 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), this Court had under consideration the application of said Rule 14. There, this Court stated that: "There is no question here as to whether the joinder of the various counts in one indictment was permissible under Rule 8(a), Fed. R. Crim. P. – it was. The point is that a severance should have been granted because, for trial purposes, the joinder was prejudicial under Rule 14, Fed. R. Crim. P. Here, there was not only the danger of the evidence with respect to the two robberies cumulating in the jurors' minds tending to prove the defendant guilty of each, but the evidence as to one of the robberies was so weak as to lead one to question its sufficiency to go to the jury. Thus, its primary usefulness in this trial was to support the Government's case as to the robbery which resulted in the murder."

Indeed, where an indictment charges thirty-seven separate and distinct crimes against each of three defendants, the conclusion is irresistible that evidence of other crimes is being admitted in violation of the established rule. Thus, in the case of *Drew v. United States*, 118 U.S. App. D.C. __, 15, 331 F.2d __, 89 (1964), in a fully explicated opinion, this Court held, among other things, that: "We must still determine whether this case falls within the 'simple and distinct' test as formulated in the *Dunaway* case, *supra*, Note 14. As pointed out above, the very essence of this rule is that the evidence be such that the jury is unlikely to be confused by it or misuse it. It is not mere conjecture to say that the jury may have been confused in this case. A perusal of the record shows that witnesses' responses at times indicated confusion as to which crime counsel were referring to in their questions; the two crimes were repeatedly referred to as of the same order; and the prosecutor in his summation, not unnaturally, lumped the two together on occasion in his discussion of the evidence. These lapses do not appear to have been purposeful, but lack of improper motivation does not lessen their impact on the jury. If separate crimes are to be tried together and we are not to be understood as intimating any conclusion that this can never, as a practical matter, be successfully undertaken, both court and counsel must recognize that they are assuming a difficult task, the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial. The confusion here was probably the result of the superficial similarity of the two crimes and the way in which they were committed. On this record, we cannot say that the jury probably was not confused or probably did not misuse the evidence, as Judge Hand was able to hold in *Lotsch*. For these reasons, we find that there was prejudice in the joinder and the court below should have granted separate trials. The conviction is reversed and the case is remanded." Accord: *United States v. Quinn*, 7 Cir., 365 F.2d 256 (1966), and *Stern v. United States*, 2 Cir., 409 F.2d 819 (1969).

Here, in the case at bar, severance should have been granted because, for trial purposes, the joinder of 37 offenses, each, and III offenses in toto, was

prejudicial to the appellants and in violation of Rule 14 of the Federal Rules of Criminal Procedure.

It is quite evident from the record that evidence in support of these multiple Counts cumulated in the jurors' minds tending to prove the guilt of appellants.

In the light of the foregoing, it is now crystal clear that the Trial Court erred in its denial of appellants' Motion for Severance.

II

APPELLANTS WERE DENIED THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION

The Sixth Amendment to the Federal Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Appended to appellants' "Motion for New Trial and in Arrest of Judgment," filed in the court below, are the affidavits of Marino J. Maturo, Louis P. Vecchiarello and Anthony V. Vecchiarello, the appellants herein, in which they detail the pre-trial and trial ineffectiveness of their counsel (App. to Brief, pages A-18 – A-24).

In one of the early cases dealing with the question of ineffective assistance of counsel, the Supreme Court enunciated a doctrine which has enlightened judicial minds for the past 28 years. Therefore, in the case of *Powell v. Alabama*, 287 U.S. 45, 58 (1932), Mr. Justice Sutherland, speaking for the Court, and

among other things, said: "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: "The record indicates that the appearance was rather proforma than zealous and active – under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." The Court further stated that: "To hold otherwise would be to ignore the fundamental postulate, already adverted to – that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard."

In the case of *Glasser v. United States*, 315 U.S. 60, 75-76 (1941), the Supreme Court observed and held, among other things, that: "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness. To determine the precise degree of prejudice sustained by Glasser, as a result of the court's appointment of Stewart as counsel for Kretske, is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from the denial. . . . Of equal importance with the duty of the court to see that an accused has the assistance of counsel, is its duty to refrain from embarrassing counsel in defense of an accused by insisting, or, indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client when the possibility of that divergence is brought home to the court."

The Court further stated that:

> "In conspiracy cases, where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the beneift of the undivided assistance of his counsel without the court's becoming a party to encumbering that assistance. . . . Our examination of the record leads to the conclusion that Stewart's representation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the sixth amendment."

The rationale of the *Glasser* case, *supra*, is quite opposite to the facts in the instant appeal. It appears from the record that Attorney Herbert Siegal was trial counsel for appellant, Anthony V. Vecchiarello, only, and attorney Menard was counsel for appellants, Marino J. Maturo and Louis P. Vecchiarello. That not withstanding the foregoing, appellant, Anthony V. Vecchiarello, was compelled to share the final argument on his behalf, by his counsel, with that of the other two appellants, and that the latter were denied the right of having their own counsel conduct final arguments on their behalf.

In this respect, counsel for appellants Marino J. Maturo and Louis P. Vecchiarello proceeded as follows: "Mr. Menard: . . . Ladies and gentlemen of the Jury: The government charges each defendant acting in concert with the other two is guilty of each and every count of this indictment that you will receive in the jury room. We disagree. However, to save duplication of final argument, I am deferring to Mr. Siegal, co-counsel, who will give one comprehensive argument covering all counts and all defendants. I thank you at this time for any conversation (consideration) you will render to my two clients, Mr. Maturo and Mr. Louis Vecchiarello. Thank you." (Tr. 926).

The foregoing had the approval of the trial judge, in that the court reacted as follows: "The court: All right, Mr. Siegal." (Tr. 926).

Thus, it is shown from the foregoing that the trial court permitted, by implication, attorney Siegal to make the closing argument on behalf of all the defendants (appellants herein). That as a result of the same the appellants were deprived of the effective assistance of counsel. The constitutional guarantee of the assistance of counsel includes the right of the accused to have counsel unembarrassed by representation at the same trial of others whose interest are adverse and conflicting. It was, likewise, plain error to permit one attorney to represent two defendants in a case where each defendant is charged with separate offenses under a Thirty-seven Count indictment.

It was equally erroneous to permit one attorney to make the final argument on behalf of the three defendants, under the circumstances in the case at bar.

The appellants were led to believe that there would be a separate attorney representing each appellant at the trial. It was represented to appellants by attorneys Siegal and Menard that Attorney William T. Sherwood would be the third attorney in the case.

When Attorney Sherwood appeared at the trial table of the defense, the following colloquy took place:

> "Mr. Anderson: Your Honor, there is someone at defense table that the court was not introduced to. This is the gentleman at the end. We don't know who he is." "Mr. Menard: William T. Sherwood, a member of the Bar of Virginia." "The court: has he entered an appearance in this case?" "Mr. Sherwood: No. I am a friend of Mr. Siegal." "The court: All right, are you going to participate in the trial?" "Mr. Menard: He will only be here this morning, Your Honor." "The court: Wouldn't it be just as satisfactory to have him sit in the front row rather than at counsel table?" "Mr. Menard: That will be all right." (Tr. 22-23).

The affidavit of appellant, Louis P. Vecchiarello, points out that he paid Attorney Siegal $8,000.00, initially, and $16,667.00 to engage other counsel

for him; namely, Attorney William T. Sherwood. That the latter was represented to affiant as "a very prominent criminal attorney in Washington, D.C." (App. to Brief, pages 19, 20).

The affidavit of appellant, Marino J. Maturo, points out that the affiant paid Attorney Siegal $8,000.00 in May 1970. That later he was told by Attorney Siegal that affiant would be required to pay, in cash, an additional sum of $16,670.00 before June 8, 1970, which affiant paid. Mr. Siegal told affiant that Attorney William T. Sherwood would be his trial counsel. (App. to Brief, pages 21, 22).

The affidavit of appellant, Anthony V. Vecchiarello is practically the same as that of the other appellants above in respect to the moneys paid Attorney Siegal and the latter's representation. (App. to Brief, pages 23, 24).

In addition to the foregoing disclosures, it is made clear that the appellants had spent over a week with Mr. Siegal at his New York office discussing their defenses and had given him the names of numerous witnesses. That they were surprised and shocked when, on the Sunday of June 14, 1970, the day before defendants were to put on their defenses, Attorney Siegal arbitrarily refused to put on appellants' defenses.

In the case of *United States v. Charles Hammonds*, No. 22,744,Slip Opinion entered on March 30, 1970, this Court discussed at length the question of "ineffective assistance of counsel," and reviewed the holdings in many pertinent cases. In its opinion, this Court stated, among other things, in footnote 10, that: "The concurring opinion of Judge Burger in Johnson v. United States, 124 U.S. App. D.C. 29, 360 F.2d 844, 846 (1966), discusses in some detail the duty of counsel at both the trial and appellate level. He said in part: 'the lawyer engaged in defense of an accused should be, and should be recognized as, a professional advocate with a highly important but nonetheless limited function, *i.e.*, limited and circumscribed by the rules of the system and the ethics of the profession. At the trial stage his duty is to put the prosecution to its proof, to test the case against the accused, to insist that the

procedural safeguards be followed and to put forward evidence which is valid, relevant and helpful to his client. . .' In short, he is to 'put his client's best foot forward'". After an analysis of many pertinent holdings and a recital of the final argument of defense counsel, this Court further stated that: "Further detailed discussion of the proceedings and contentions of the respective parties would serve no useful purpose. Viewing the record as a whole we are compelled to the conclusion that trial counsel failed to meet the minimum requirements for effective assistance of counsel. Many of them might well be justified as proper trial tactics. But the totality of the omissions and errors, and particularly the futile closing argument, clearly reflect a pro forma defense and a lack of adequate representation in the preparation and trial of the case. Appellant has sustained his burden of establishing his claim that he was deprived of his constitutional right to the effective assistance of counsel."

The record before this Court shows that not only did Attorney Siegal abandon the sole representation of his client, the appellant, Anthony V. Vecchiarello, in the final argument but he also abandoned him for appellant, Maturo, at the outset of the trial. In this respect, the prosecution directed the court's attention to his departure as follows:

> "The court: Mr. Glanzer." "Mr. Glanzer: Your Honor, I was rather surprised to see that Mr. Siegal was arguing this point on behalf of the defendant Maturo since we all believe, at least, that he was representing the defendant, Anthony Vecchiarello," . . . (Tr. 7-8).

Mr. Glanzer further states that: "Your Honor, I might point out that Mr. Siegal's concern for the defendant Maturo was admirable, but he has his own problems with defendant Anthony Vecchiarello. We have a certified copy which shows that he was incarcerated at Westchester Penitentiary during 1962 for something less than eight months and could not possibly, physically, have been in Mexico studying at Guadalajara Medical School or anywhere else." (Tr. 11-12).

Moreover, the extent to which the appellants were misled by their attorneys, is evidenced by not informing appellants of counsel's decision not to put appellants on the witness stand until Sunday, June 14, 1970, a day before they were to put on their defenses when, as a matter of fact, appellants' counsel had stated to the court on June 8, 1970 that they would not put appellants on the witness stand. (Tr. 13).

After counsel for appellants had announced their decisions to the court to withhold appellants from the witness stand, the court addressed Mr. Siegal as follows: "The court: Mr. Siegal, you are from New York, but you are familiar with the decisions in this jurisdiction. If you are not, I know Mr. Menard is, but these defendants should be advised that they may take the stand without being confronted with their prior records unless they bring their own character and reputation into issue." (Tr. 15-16).

In furtherance of appellants' counsel's decision to hear the Government's evidence against appellants and grapple with the same without offering any defense thereto, Mr. Menard waived opening statements on behalf of appellants, Maturo and Louis P. Vecchiarello, while Mr. Siegal made himself conspicuous by making an opening statement on behalf of appellant Anthony Vecchiarello, in which he proposed to prove nothing by way of his defense.

In *Clark v. United States*, 104 U.S. App. D.C. 27, 259 F.2d 184 (1958), the defendant was convicted of first degree murder. The defense of insanity had been interposed. Counsel in his argument to the jury abandoned that defense and argued that it was a "case of manslaughter, not a case of first degree murder." This was held to be error and the case was remanded for a new trial. In a dissenting opinion, Judge Burger took the position that on the record counsel had a "right to believe that it would be in appellant's best interest to use the tactic of admitting appellant's obvious guilt and seeking a lesser punishment." Judge Burger recognized, however, that a basis for reversal may be "grounded on ineffective assistance of counsel for failing to press an essential or central element of defense." (259 F.2d at 186, 187).

On the record before this Court, considered as a whole, it is made manifest that trial counsel's overall representation of appellants was mechanical and at best perfunctory, thereby ineffective, and in violation of the Fifth and Sixth Amendments to the Federal Constitution.

III

APPELLANTS WERE DENIED A FAIR AND IMPARTIAL TRIAL, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION, FOR THE FOLLOWING REASONS:

A. The Bias of the Trial Judge

Title 28, Section 144 of the U.S.C. provides in part that: "Whenever a party to any proceeding in a District Court makes and files a timely and sufficient affidavit that the Judge before whom the matter is pending has a personal bias or prejudice, either against him or in favor of any adverse party, such Judge shall proceed no further therein, but another Judge shall be assigned to hear such proceeding." (63 Stat. 99).

In the case of *Young v. United States*, 120 U.S. App. D.C. 312, 346 F.2d 793 (1965), Chief Judge Bazelon, spoke at length on the question of bias of the trial judge and the responsibilities of an attorney to his client. In this respect, the Court, among other things, said: "Furthermore, we find no basis for the court's criticism in this case and in other cases, that counsels associated with the Legal Aid Agency are too aggressive in representing their clients and that they improperly deal with the prosecutor at 'arm's length', unlike the 'older lawyers'".

A recurrent argument against the public defender is that because he and the prosecutors are paid by the public treasury and are in continual contact, there is danger that they will not deal at "arms length" and the public defender will lack the essential adversary zeal. It would appear that the Legal Aid Agency for the District of Columbia should be commended for averting this danger.

The Court further stated in its opinion that: "The instances discussed were not the court's only criticisms of both defense counsel. Interruption for criticism occurred frequently, and most often during cross examination of vital government witnesses. Though the court also interrupted the prosecutor to criticize him, this was less severe and much less frequent than the criticism of defense counsel. The court's continual intervention may well have tended to unnerve (each defense counsel) and throw him off balance so that he could not devote his best talents to the defense of his client." In concluding his opinion, Chief Judge Bazelon stated: "We cannot say with sufficient confidence that the jury did not hear the court's remarks and were not thereby prejudiced. Moreover, the court's extensive interference with defense counsel's cross examination may have prejudiced the defendants, notwithstanding the strong evidence presented against them. And finally, even if no prejudice to the defendants were apparent, the interests of public justice require a trial conducted by one who is a disinterested and objective participant in the proceeding."

In the case of *Marshall v. United States*, 360 U.S. 310 (1959), the petitioner was convicted of unlawfully dispensing a number of dextro amphetamine sulfate tablets. Certiorari was granted to determine the question "Whether exposure of some of the jurors to newspaper articles about petitioner was so prejudicial in the setting of the case as to warrant the exercise of our supervisory power to order a new trial." During the trial the petitioner never took the stand nor did he offer any evidence. The Government asked to be allowed to prove that petitioner had previously practiced medicine without a license, as tending to refute the defense of entrapment. The trial judge refused this offer, saying, 'it would be just like offering evidence that he picked pockets or was a petit thief or something of that sort, which would have no bearing on the issue and would tend to raise a collateral issue and I think would be prejudicial to the defendant." However, during the trial two newspapers containing such information got before a substantial number of jurors. One news account said: "Marshall has a record of two previous convictions.

"In 1953, while serving a forgery sentence in the State Penitentiary at McAlester, Okla., Marshall testified before a state legislative committee studying new drug laws for Oklahoma.

"At this time, he told the committee that although he had only a high school education, he practiced medicine with a $25.00 diploma he received through the mails. He told in detail of the ease in which he wrote and passed prescriptions for dangerous drugs."

Seven of the jurors had read or scanned the above article. Each of the seven jurors, when asked, told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of the record, and that he felt no prejudice against the petitioner as a result of the articles. The trial judge felt there was no prejudice to petitioner and denied the motion for mistrial. In reversing the conviction and the judgments of the lower court, the Supreme Court held that: "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States,* 335 U.S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures."

In the *Michelson* case, *supra,* cited in the opinion, it was held that: "Courts that follow the common law tradition almost unanimously have to come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, . . . but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." The motion to disqualify Judge Smith should

have been granted, because of his prejudicial and biased conduct exhibited prior to, during and after trial. He stated that he was very disturbed and annoyed at the appellants because they continued their practices after the return of the indictment. Judge Smith, at the time aforesaid, well knew that Judge Waddy of the District Court, on March 17, 1970, held in abeyance a motion for injunction brought by the District of Columbia to enjoin and restrain the appellants from continuing their practices, pending the trial under the indictment.

Judge Smith recalled the jury from their deliberation of the case on three different days for further instruction on the law, and to read other Counts of the indictment to the jury. (Tr. 1025).

Judge Smith failed to instruct the jury as to the elements of each crime – all of which was prejudiced to the appellants.

It is crystal clear from the foregoing that Judge Smith was biased in his conduct of the trial and that bias impaired appellants' right to a fair and impartial trial.

B. The Denial of Appellants' Motion for Change of Venue

Appellants' motion for change of venue should have been granted because of the news media coverage occurring immediately following the return of the indictment. It gained paramount significance when all of the news mediae publicized the case at bar all along the east coast with marked emphasis concentrated in the Washington, Baltimore and Florida areas.

Medical journals with national publication and subscriptions played an active precursory part. In the light of this background and inflated atmosphere, it was manifest that no prospective jury could deny knowledge of the case prior to being summoned for jury service.

It was virtually impossible that all jurors would answer in the negative but they did, as evidenced by many negative statements in open court with their newspapers tucked under their arms. (Tr. 33).

Indeed, many of the prospective jurors admitted that they had read about the case in the news mediae. (Tr. 33-39). Such coverage could not help but reach the greater majority of the Washington area. Under such circumstances, appellants could not have had a fair trial.

Rule 21(a) of the Federal Rules of Criminal Procedure provides that:

> "(a) For Prejudice In The District. The court, upon motion of the defendant, shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion, if the court is satisfied that there exists in the district where the prosecution is pending, so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

This Court observed in the case of *Jones v. Gasch*, ___ U.S. App. D.C. ___, 404 F.2d 1231, 1235 (1967), that: "The objectives these provisions were designed to achieve are evident. Rule 21(a) was intended to rectify a deficiency in the law by affording the accused an opportunity to avoid provincial emotion so intense as to doom the objectivity of the trial. Judicial construction of the rule in its original form attested both the high standard it set and the defendant's responsibility to meet it."

In the case of *United States v. Amador Casanas, et al.*, D.C.D.C. 233 F. Supp. 1001 (1964), Chief Judge Curran transferred the case to the District of Puerto Rico for trial.

In the latter case, the four defendants were charged with violation of mail fraud and fraud by wire statutes. The indictment was laid in 21 Counts. The court stated in its opinion that: "The majority of the counts are alleged

to have been committed in the District of Puerto Rico, as well as in the District of Columbia. The government should not be allowed to select a forum that is not convenient, and sometimes even unfair to a defendant by only joining some counts that are nontransferrable. Venue statutes are to be liberally construed so as to minimize inconvenience to a defendant." See also, *Bailey & Golding*, remedies for prejudicial publicity – change of venue and continuance in federal criminal procedure, 18 Fed. B.J. 56 (1958), and cases cited therein.

C. The Refusal of the Trial Court to Take Judicial Notice of the Reciprocity Agreement Between the United States and Mexico

The reciprocity agreement between the United States and Mexico is limited to permit citizens of one country to become licensed physicians in the other under conditions similar to each country. *Clark v. Allen*, 331 U.S. 503, 507-508 (1947). The Trial Court refused to take judicial notice of the foregoing reciprocity agreement. Such reciprocity does not accord to the other government the right, physical or legal, to determine the modes and methods of procuring medical licenses in the other's jurisdiction. Here, in the case at bar, the Government challenged the wisdom of a foreign country in the latter's determination of the validity of procedures and means of education employed in such foreign country. Mexico is not a part of the United States, but, on the contrary, is an independent sovereignty; consequently, under international law the courts of the United States are without power to challenge the validity of foreign documents to the extent that they are invalid. The courts may refuse to honor the same but cannot penetrate their authenticity. 87 C.J.S., *Treaties*, Sections 13 and 19(c). State and local laws must yield when they are inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. *United States v. Pink*, 315 U.S. 203, 230-231.

D. The Trial Court Permitted the Government to Suppress Evidence Beneficial to Appellants

The Trial Court refused to permit defense counsel to read to the jury portions of an "EBT" which was in evidence by stipulation. The Trial Court did, however, permit the prosecution to read ostensibly inflammatory statements from such "EBTs" to the jury. Since the said "EBTs" were stipulated by the parties, and offered in evidence by the prosecution, the aforesaid refusal was a violation of appellants' evidentiary, contractual and constitutional rights.

In respect to other documents in the files of the licensing board subpoenaed by the Government, the Trial Court inspected said documents, including the remaining documents and letters appearing in said files, and thereupon, of his own motion, stated in open court that he saw nothing therein of any benefit to the defendants. That they were just some further correspondence and responses made by the board. The foregoing statement by the trial judge stands in refutation of the Board's testimony that no investigation was made.

It was held in the case of *Decker v. George W. Smith & Co.*, 88 N.J.L. 630, 96 A. 915, 917 (1916), that: "The defendants also contend that it was erroneous to admit in evidence a letter written to the plaintiff's assignor by one alleged to be its agent. Not so. Where, as in the present case, a paper is produced on notice and submitted to the inspection of the other side, it becomes, by reason of such production and inspection, evidence for both parties on the ground that to allow a party after requiring his adversary to produce the paper and after inspecting it, to insist on excluding it would give him an unfair advantage."

A book or document offered in evidence, including public documents and records, as well as private documents and writings, must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor. Indeed, the party producing the

document in the first instance is sometimes required to read the entire instrument, on the ground that unless the whole is read there can be no certainty as to the real issue. . . ." 32A C.J.S., *Evidence*, Sec. 774. See also, 60 Col. L. Rev. 858 (1960).

E. The Trial Court Failed to Fully Instruct the Jury On the Law Applicable to the Evidence Adduced at the Trial

Under the fundamental maxims of the common law, from the earliest times, it was taken for granted that the jury should be the judges only of the issues of fact, and the court should be judge of the law. It is still generally held that the determination of the law is for the court, not for the jury, and that the judicial instructions as to the law and the rulings of the court during the trial are judicial functions and consequently binding on the jury. 23A C.J.S., *Criminal Law*, Sec. 1118.

It is the duty of the trial judge to declare to the jury what the law is, with its exceptions and qualifications, and then to state hypothetically, that if certain facts, which constitute the offense, are proved to their satisfaction beyond a reasonable doubt, they will find the defendant guilty, otherwise they will acquit him. An instruction which fails to state the law properly, and simply instruct a verdict on proof of certain facts, is improper. *Morris v. United States*, 9 Cir., 156 F.2d 525.

On page 1001 of the transcript, is found the charge of the Trial Court to the jury on the law applicable to direct and circumstantial evidence. In these respects the court stated: "Now, ladies and gentlemen, there are two types of evidence from which you may find the truth as to the facts of the case, direct evidence and circumstantial evidence. Direct evidence is the testimony of one who asserts actual knowledge of a fact such as an eye witness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of the defendant."

"The law makes no distinction between the weight to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence." (Emphasis supplied).

The above instruction on circumstantial evidence is misleading in that it fails to consider the substantial evidence rule included therein. In the case of *Carter v. United States,* 102 U.S. App. D.C. 227, 252 F.2d 608 (1957), this Court reversed the judgment of the Trial Court, and in so doing the opinion stated, among other things, that: "This court has held many times that the rule for the jury is that unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty, and that where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must be not guilty. It is not necessary to a verdict of acquittal that on the basis of the facts established, a hypothesis of innocence be as likely as one of guilt; any reasonable hypothesis of innocence must be excluded by the facts."

It is quite apparent from an analysis of the foregoing opinion of this Court that the instruction given by the Trial Court was lacking in its failure to expand the instruction on circumstantial evidence, so as to include "substantial evidence," "exclusion of every reasonable hypothesis but guilt," and "where all of the substantial evidence is consistent with any reasonable hypothesis of innocence."

The Trial Court was likewise in error when it instructed the jury that: ". . . Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence." The foregoing instruction is in the very teeth of the language used by this Court in the *Carter* case, *supra.*

Counsel for appellants concede that due to the "ineffective assistance of counsel" in the Trial Court, no objection to the foregoing charge on circumstantial evidence was interposed on behalf of appellants. Appellants, however, invoke the discretion of this Court pursuant to the provisions of Rule 52(b) of the Federal Rules of Criminal Procedure.

At page 1022 of the transcript the court stated to counsel for the respective parties, after the jury had begun its deliberation, that: "Gentlemen, with the many books I had here, I did overlook the instruction on forging and uttering and specific intent. I am going to give that now. Any objection by the defense?" There was no objection. Thereupon, the court recalled the jury from its deliberation and further instructed them – on forgery, uttering and specific intent. (Tr. 1022-1025). After the completion of its "further instructions" the court inquired of counsel whether they were satisfied and counsel answered in the affirmative. (Tr. 1025).

It appears from an analysis of the court's further instructions to the jury, aforesaid, that the court failed to tell the jury that "where the instrument is both forged and uttered by the same person," "there is only the single crime of forgery committed."

Thus, in the case of *Frisby v. United States*, 38 App. D.C. 22, 27 (1912), this Court, speaking on the statutory offenses embodied in Code 843, 31 Stat. 1326 (now, D.C. Code, Sec. 22-1401), said: "Our code defines the crime as follows: "Whoever, with intent to defraud or injure another, falsely makes or alters any writing of a public or private nature, which might operate to the prejudice of another, or passes, utters, or publishes, or attempts to pass, utter or publish as true and genuine, any paper so falsely made or altered, knowing the same to be false or forged, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years."

This Court stated in the foregoing opinion, that: "It will be observed that the statute defines two distinct criminal acts, either of which constitutes the crime of forgery. The making of a false instrument with the intent to defraud is forgery. But where the instrument is both forged and uttered by the same person, as in this case, there is only the single crime of forgery committed."

In the case of *People v. Adler,* 140 N.Y. 331, the indictment on one Count charged the defendant with forging a written instrument, and on another Count with uttering it on the same date and at the same place. It was held by the court of Appeals of New York, that the indictment charged only one offense – the crime of Forgery.

In *People v. Altman,* 147 N.Y. 473, 42 N.E. 180, the indictment, containing but a single Count, alleged that the defendant forged an indorsement on a bank check, with intent to defraud a person named, and offered the same to such person in payment for goods purchased. It was held that the indictment charged but one offense. Holding to the same effect are the following cases: *In re Walsh,* 37 Neb. 454, 55 N.W. 1075; *State v. Moore,* 86 Minn. 422, 90 N.W. 787, and *Territory v. Poulier,* 8 Mont. 146, 19 Pac. 594.

F. The Trial Court Failed to Grant Appellants' Motion for a Mistrial

The Trial Court permitted the prosecution to make remarks to the jury that required the defendants to make opening statements of what each expected to prove (Tr. 68), and to use "also known as" (Tr. 73), thus placing the character of the defendant in issue without the defendant having first done so himself, in violation of, and contrary to the holding of the Supreme Court in the case of *Michelson v. United States,* 335 U.S. 469.

In addition to the foregoing, the motion for a mistrial should have been granted in the light of the trial judge's remark that there was "overwhelming" evidence without reference to quality and quantity of same to the extent of credible evidence, admissible evidence and evidence which shows beyond a reasonable doubt. His statement was published throughout the newspapers, radio and medical periodicals creating the guilt of the defendants. The Supreme Court has held the foregoing to be amenable to a motion for a mistrial in the case of *Marshall v. United States,* 360 U.S. 310 (1959).

It is therefore manifest that there was ample evidence to impel the granting of defendants' motion for a mistrial.

G. The Trial Court Violated the Best Evidence Rule and the Jencks Act in Admitting the Testimony of Doctors Humberto Castro, Solas, Diaz, *et ux.*

The record in the case at bar shows, in respect to the admission of testimony of Doctors Humberto Castro, Solas, Diaz and wife, the appellants were not furnished by the prosecution any statements made by the foregoing four witnesses. (Tr. 498).

In this respect, Section 3500 of 18 U.S.C. provides in part as follows:

> (b) "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."
>
> (d) "If the United States elects not to comply with an order of the Court under paragraph (b) or (c) hereof, to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court, in its discretion, shall determine that the interests of justice require that a mistrial be declared."
>
> (e) "The term 'statement', as used in subsection (b), (c) and (d) of this section in relation to any witness called by the United States means (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical or other recording or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Construing and explicating the purpose of the foregoing statute, Mr. Justice Frankfurter, speaking for the Court in *Palermo v. United States,* 360 U.S. 343, 345, 346, stated, among other things, that: "Exercising our power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the Federal courts, this court on June 3, 1957 in *Jencks v. United States,* 353 U.S. 657, decided that the defense in a federal criminal prosecution was entitled under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by Government witnesses. These statements were, therefore, to be turned over to the defense at the time of cross examination if their contents related to the subject matter of the witness' direct testimony, and if a demand had been made for specific statements which had been written by the witness or, if orally made, as recorded by agents of the Government."

The opinion of Mr. Justice Frankfurter further states that: "It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself."

In the case at bar, the witnesses in question were very material witnesses and it is difficult to conclude that these witnesses had not made statements to the Government's agents, especially the one from Merida, Mexico.

If the statements were sought and refused by the prosecution, then the appellants were entitled to a mistrial or their testimony being stricken under Section 3500(d) of the said Jencks Act.

If, on the other hand, defense counsel did not request such statements, as required under Section 3500(b) of the said Act, then appellants were denied the effective assistance of counsel.

H. The Court Erred in not Directing that the Jury Be Properly Polled

The poll of the jury as requested by defense counsel was conducted in such a manner as if the request were denied. The jurors were asked, in toto, not individually, with the court's approval, that they should raise their hand if their verdict differed with the forelady's reading of the verdict.

It is practically impossible for a juror, without serious review of his or her individual verdict, to say "no" instantaneously because there were involved over 100 verdicts of both innocence and guilt as to all defendants.

In the case of *State v. Cleveland*, 6 N. J. 316, 78 A.2d 560, the Court in defining what constitutes polling of the jury, stated: "The polling of the jury is a procedure whereby the jurors are asked, individually, the finding they have arrived at as denoted by the question posed by the Clerk, 'how do you find?' The practice of long standing requires each juror to answer for himself, thus, creating individual responsibility, eliminating any uncertainty as to the verdict announced by the foreman."

In concluding the above opinion, the Court stated: "We think the law clearly demands that when a jury in a murder case is polled, each juror, if he finds the defendant guilty, shall designate by his verdict whether it be murder in the first degree or in the second degree."

In the case of *Williams v. State*, 60 Md. 402, ___ Atl. (1883), the jury, by their foreman, declared the defendant guilty of murder in the first degree. Before the verdict was recorded, a poll of the jury was demanded and each juror responded "guilty" without specifying the degree of murder. On conclusion of the poll, the Clerk of the Court called upon them to hearken to the verdict as the court has recorded it, saying, "your foreman saith that Jason Williams, the prisoner at bar, is guilty of murder in the first degree, and so say you all." The sufficiency of this finding was the sole issue on appeal, which resulted in a reversal of the judgment of conviction and the

awarding of a new trial. The Maryland Court of Appeals said: "The prisoner was entitled, as a matter of right, to a poll of the jury, and he could not be convicted except upon the concurrence of each juror. Upon the poll, it was the duty of each juror to say for himself whether he found the prisoner guilty of murder in the first or second degree. We all know that jurors sometimes, upon the poll, dissent from the verdict declared for them by their foreman, and it is for the purposes of compelling each juror to declare his own verdict, in his own language, that a poll of the panel is allowed."

"Upon the poll in this case, there was a single juror who, in finding the prisoner guilty, ascertained the degree of murder as required by the code. On the contrary, the verdict was 'guilty', and such a verdict is, as we have said on an indictment for murder, a nullity."

This Court considered the issue of jury polling in the case of *Keys v. United States*, 120 U.S. App. D.C. 343, 346 F.2d 824 (1965). There Circuit Judge Burger (now Chief Justice) stated that: "A jury poll is obviously in part an 'audit' or an inquiry whether they did, in fact, vote the result as announced. No case has ever held that the presiding Judge must explain to the jury, as the appellant now contends, that jurors also have the power to undo or reverse the vote case in the jury room. We need not reach the question whether some form of explanation ought to be given in these circumstances, since no request was made. It is surely arguable that the very fact of returning the written 'ballot' or vote sheet to the jurors would be treated by them as a resubmission of the announced choice for reconsideration. It would doubtless be permissible, even if not mandatory, for the trial Judge, on request, to explain that the purpose of polling is to make certain of the official verdict announced in open court."

Thus, it is quite apparent from the record before this Court, in the instant case, that the jurors were not questioned individually and separately, as required by the decisions cited and analyzed above.

"In polling the jurors, it is not sufficient to question them collectively whether they have agreed to the verdict, even though each and all express assent thereto; but each juror should be questioned individually and separately, since the object of a poll is to call on each juror to answer for himself and in his own language. Each juror is required to answer for himself in order to create individual responsibility and to eliminate any uncertainty as to the verdict as announced by the foreman." (23A C.J.S. #1392C, page 1051). It was, therefore, reversible error in polling the jurors collectively in the case at bar.

I. The Trial Court Erred in Its Failure to Instruct the Jury that a Defendant cannot be Convicted of Performing Acts Which He Honestly Believes He has a Legal License to Perform

The record shows that the defendants were duly licensed to practice their professions in the District of Columbia.

While the necessity for an instruction largely depends on the facts of each particular case, generally speaking, an instruction is essential if it is vital to a proper consideration of the evidence by the jury. It is the duty of the Trial Court to instruct the jury on every essential question in the case so as to properly advise the jury of the issues, whether or not such instructions are requested. 23A C.J.S. 1190.

In the case of *Cooper v. United States*, 123 U.S. App. D.C. 83, 357 F.2d 274 (1965), Chief Judge Bazelon stated that: "A trial judge must exercise great care when he summarizes specific evidence in the case for the jury, and even greater care is required if he chooses to go further and instruct the jury on the legal consequences of specific evidence."

In the case at bar, the appellants honestly believed that they were duly licensed to practice their professions. They were strengthened in this respect by the refusal of a District Court Judge to enjoin their practice pending trial herein.

Indeed, if the appellants honestly believed that they were duly licensed to practice their professions, then, such belief would arise in negation of any criminal intent, or "animus furand!"

Thus, in the case of *Morissette v. United States,* 342 U.S. 246, where the defendant was charged with larceny of Government property in violation of 18 U.S.C. 641, the defense of "honest belief" of right or ownership was upheld. There, the Trial Court was unimpressed with defendant's belief that the property in question was abandoned by the Government, and ruled that: "He took it because he thought it was abandoned and he knew he was on Government property . . . that is no defense – I don't think anybody can have the defense because they thought the property was abandoned on another man's piece of property." That the Trial Court further stated: "I will not permit you to show this man thought it was abandoned. . . . I hold in this case that there is no question of abandoned property." The Trial Court refused to submit or to allow counsel to argue to the jury whether Morissette acted with innocent intention. The Sixth Circuit affirmed the conviction. The Supreme Court reversed after an historic review of the law. In reversing, Mr. Justice Jackson held that: "Moreover, the conclusion supplied by presumption in this instance was one of intent to steal the casings, and it was based on the mere fact that defendant took them. The court thought the only question was, 'did he intend to take the property?' That the removal of them was conscious and intentional, was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert; that is, wrongfully to deprive another of property. Whether that intent existed, the jury must determine – not only from the act of taking – but from that together with defendant's testimony and all of the surrounding circumstances."

"Of course, the jury, considering Morissette's awareness that these casings were on Government property, his failure to seek any permission for their removal and his self interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings

were abandoned was an afterthought. Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to the Judges. They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk, and that lack of any conscious deprivation of property or intentional injury was indicated by Morissette's good character, the openness of the taking, crushing and transporting of casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that, too, would have been the end of the matter" . . . "Reversed".

The rationale of the holdings of the lower courts, in the *Morissette* case, was that the doing of the act prescribed by the statute, constituted a violation of the statute and that the intent of the defendant is immaterial. In order to destroy such myth, Mr. Justice Jackson traced the history of the question to the Roman Law and linked his findings to the early common law and, thereafter, to 'Anglo-American Jurisprudence'. Therefore, we have the foregoing *Morissette* decision preserving to the defendant, the defense of 'right and good faith', to negate criminal intent in the commission of an offense.

Thus, it is quite manifest that the Trial Court erred in its failure to charge the jury that if they find from the evidence that the appellants acted in good faith in reliance on their licenses, then, in that event, their acts were not in violation of any statute or regulation described in the several Counts of the indictment.

J. The Trial Court Erred in Its Failure to Instruct the Jury that They Could Return a Verdict of the Lesser Degree of the Crimes Provided in Title 2, Section 102, *et seq.*, of the District of Columbia Code

Section 2–102 of the District of Columbia Code, prohibits any person from practicing the healing art without a license or being duly registered.

Section 2-126 of the District of Columbia Code, provides that: "No person shall alter or forge, or attempt to alter or forge, any diploma or other evidence of graduation in the healing art, or any certificate or evidence of any kind, with the intent that it shall be used to evade the provisions of this subchapter."

Section 2–130 of the District of Columbia Code, provides that: (a) "Any person violating the provisions of this subchapter, except Section 2–102, shall be punished by a fine of not more than $100 or by imprisonment for not more than ninety days, or by both such fine and imprisonment."

(b) "Any person violating the provisions of Section 2–102, shall be punished for the first offense by a fine of not more than $500 or by imprisonment for not more than six months, or by both such fine and imprisonment."

Rule 31(c) of the Federal Rules of Criminal Procedure provides: (c) . . . "The defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

The greater offense charged in the indictment, in the case at bar, is the violation of the District of Columbia Code, Section 22-1401. As the Supreme Court has recognized the felony provision as "the capstone of a system of sanctions which, singly or in combination, were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency," *Spiers v. United States*, 317 U.S. 492, 497, appellants shall show hereinafter such applicability to the instant case.

The rule has been established by the Supreme Court settling the requirements for includable lesser offenses, in the case of *Sansone v. United States*, 380 U.S. 343, 349 (1965). There, the issue involved the construction of Sections 7201, 7203 and 7207 of the 1954 Internal Revenue Code, whether Sections 7203 and 7207 were includable with lesser offenses under Section 7201. The latter section was a felony while the former sections are misdemeanors.

In declaring the rule prescribing the test, Justice Goldberg held, among other things, that: "We conclude, therefore, that 7207 applies to income tax violations. Since there is no doubt that 7201 and 7203 also apply to income tax violations with obvious overlapping among them, there can be no doubt that the lesser included offense doctrine applies to these statutes in an appropriate case."

"The basic principles controlling whether or not a lesser included offense charge should be given in a particular case, have been settled by this court. Rule 31(c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged'. Thus, in a case where some of the elements of the crime charged themselves constituting a lesser crime, the defendant, if the evidence justifies it, . . . is entitled to an instruction which would permit a finding of guilt of the lesser offense . . ."

"But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense."

The offense here charged was a violation of Section 22-1401 of the District of Columbia Code which prescribed the falsely making or altering any writing of a public or private nature, or the passing, uttering or publication of the same, or attempts to do the same, with the intent to defraud or prejudice the right of another, shall be imprisoned for not less than one year nor more than ten years.

Since the elements of the District of Columbia Code, Section 2-126 and Section 22-1401, are analogous and the evidence conclusively show medical operations:

It is reasonable to extend to the jury the right to determine whether, under certain circumstances, they would convict under the misdemeanor statute or under the felony statute. Where the facts are disputed in respect to Section 22-1401 or that different inferences may be drawn from the evidence adduced thereunder, then the lesser-includable offense doctrine applies.

In the light of the foregoing, it was reversible error for the Trial Court to have failed to instruct the jury that they were at liberty to bring in a verdict of guilty for the lesser-included offense provided in said Section 2-126 of the District of Columbia Code.

K. The Withholding of Evidence of Conflict of Interest by the Prosecution Entitles Appellants to a New Trial

During the instant trial, the prosecutor (Mr. Glanzer) failed to disclose to the Court the Conflict of interest which arose when Mr. Glanzer was representing the Government, and Mr. Grogan was representing Doctors, Maturo, Vecchiarello and Biscardi at the same time. Bicardi's sealed indictment was opened up by Judge Hart after Appellants' Motion for a new trial was filed. (Pretrial Conference, 5-28-1970.)

In the case of *Griffin v. United States*, 336 U.S. 704, 706, where the Prosecuting Attorney withheld evidence beneficial to the accused: After conviction, Appeal and Denial of certiorari, the Accused filed his second motion in the Trial Court, on May 7, 1948, a little more than a month before the day set for his execution. The accused's motion was based on affidavits of his then Counsel, who averred that it had recently come to his attention that the attendant at the morgue had found an open pen knife in the trousers pocket of the deceased and that the prosecutor knew of this at the time of the trial but failed to introduce this circumstance in evidence or to make it available to the defense. The Government conceded the above facts. In ruling on the aforesaid motion, the trial court stated in an unreported opinion that: "the question whether a person is justified in attacking an assailant in self

defense must be determined by the facts which were presented to the person who pleads self-defense." That "he (Griffin) did not know, it appears, that the deceased had an open knife in his pocket, and therefore its existence was irrelevant." The Trial Court thereupon denied the motion of the accused and this Court again affirmed the conviction. The Supreme Court on the second application for certorari, granted the same. The Supreme Court reversed and remanded the case to this Court with instruction to determine the question of the admissibility of "uncommunicated threats," as applicable to the District of Columbia. Upon remand, this Court, speaking through Circuit Judge Edgerton, reversed the conviction and, in doing so, stated: "It would be unfair not to add that we have confidence in the good faith of the prosecution. Its opinion was that evidence of the concealed knife was a reasonable opinion, which the District Court sustained and no Court has overruled until today. However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. Where there is substantial room for doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful." *Griffin v. United States*, 97 U.S. App. D.C. 172, 183 F.2d 990, 993.

In *Berger v. United States*, 295 U.S. 78, 88, the Supreme Court held that: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that 'Justice shall be done'. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor; indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction, as it is to use every legitimate means to bring about a just one."

In the case at bar, the conclusion is irresistible that the conduct of the prosecuting attorney, aforesaid, constituted reversible error.

L. The Testimony of Doctor (Mrs.) Diaz was Insufficient to Constitute Re-Habilitation Evidence

The testimony of Doctor (Mrs.) Diaz, as revalidation evidence, was just as consistent with innocence as it was with guilt. (Tr. 726).

The law is well settled that prior consistent statements are admissible in some situations on the theory of "rehabilitation" of the credibility of the witness. So under what has been called the "Rehabilitation Rule," where a witness has been assailed on the ground that his story is a recent fabrication, or that he has some motive, or is under some influence, for testifying falsely, proof that he gave a similar account of the transaction when the motive or influence did not exist before the effect of such account could be foreseen, or when motives of interest would have induced a different statement, is admissible, as an exception to, or is not a violation of, the hearsay rule; prior statements in this connection, have been held not to be like ordinary hearsay. This rule applies to written statements. In order to bring a case within this rule, it is not necessary that there be a direct charge of fabrication, or an express attack on the witness' story as a recent fabrication; it is sufficient if the evidence discloses an attempt to impeach, or if the record indicates a purpose to prove a recent fabrication. 98 C.J.S., Witness, 648(3).

This Court had an occasion to consider the question of rehabilitative evidence in one of its more recent decisions. Thus, in the Case of *Coltrane v. United States*, 135 U.S. App. D.C. 295, 418 F.2d 1131 (1969), Circuit Judge Robinson, speaking for this Court in the Majority opinion, held, among other things, that: "Appellant's second Contention—that the trial Judge erred in admitting into evidence the written statement that the complainant gave to the police on February 6, 19 , draws into consideration the principles governing the use of a witness' prior extra-judicial statement in an endeavor to bolster

his trial testimony. "When the witness' testimony stands without attempted impeachment, his out-of-Court utterances are ordinarily inadmissible. Even where impeachment of the witness is sought by a showing of inconsistency between the two previous extra-judicial declarations consistent with his testimony, is normally inadmissible for the simple reason that mere repetition does not imply veracity. Prior statements of the witness are admitted—and then only for rehabilitative purposes—only in those few exceptional situations where, as experience has taught, they could be of clear help to the fact-finder in determining whether the witness is truthful."

Moreover, assuming arguendo, that there was a proper foundation laid for the admission of the rehabilitation evidence; yet, the evidence resulting therefrom was equally conducive to innocence or guilt in relation to 6 years of formal training. "Unless there is substantial evidence of facts which exclude every reasonable hypothesis but that of guilt, the verdict must be not guilty. *Garter v. United States,* 102 U.S. App. D.C. 227, 252 F.2d 608."

The foregoing is further evidence of the denial of a fair and impartial trial to the Appellants by the Trial Court.

M. The Trial Court Failed to Properly Instruct the Jury on the Issue of "Aiding and Abetting."

It must be conceded that, on the issue of "aiding and abetting," the law is well settled. That is, each defendant is not responsible for the acts of the other unless there is a common agreement or understanding amongst them to fulfill or participate in acquiring fraudulent objective or scheme through illegal methods. In this respect there must be knowledge, implied or imputed by law, in order to hold one responsible for another's acts, and that this knowledge must be that the entire plan, scheme or artifice is designed to defraud, and further it must be shown by competent evidence that some person or entity was, in fact, defrauded.

"It was incumbent upon the government to prove beyond a reasonable doubt, as an essential element of the offense defined in 18 U.S.C. 1341, that the transactions described in the indictment involved a scheme by (Appellants) to defraud." *Irvin v. United States*, 9 Cir., 338 F.2d 770 at P. 773 (1964).

In the instant case the government failed to carry its burden of proof.

Even if it were proper to apply the promoter fiduciary concept to a case of this type civilly, to do so criminally makes a shamble of the burden of proof requirements, for it allows conviction based not upon a knowing, calculated intent to defraud, but upon something else–something akin to constructive fraud.

The instruction thus given in the instant case is barren of the rationale employed in the exhaustive opinion in *Epstein v. United States*, 6 Cir., 174 F.2d 754 (1949). In the latter case, the court carefully distinguished between constructive fraud–such as might make the defendants civilly liable–and the fraud necessary to constitute a breach of 18 U.S.C. 1341. At pages 765, 766 of the opinion, the court stated: "Courts speak of actual or active fraud as contrasted with constructive fraud. Actual fraud as being defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right and which accomplishes the end design. It requires intent to deceive or defraud – to constitute actual fraud there must be such a fraud as affects the conscience – constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public interests. Constructive fraud may be found merely from the relation of the parties to the transaction or from circumstances and surroundings under which it takes place. It is said that constructive fraud is a term which means essentially nothing more than the receipt and retention of unmerited benefits."

"In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using

the mail to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud."

This court, speaking through Circuit Judge Robinson, in the case of *Post, et al v. United States*, 132 U.S. App. D.C. 189, 407 F.2d 319, 329 (1968), held, among other things, that: "We do not quarrel with the doctrines upon which Appellants pitch there second protest against the instruction.

Active rather than constructive fraud is a prerequisite to conviction for mail fraud. Mere breach of obligation does not itself constitute active fraud; there must be a specific intent to defraud." Footnotes 58 and 59 of the above opinion cited, with approval, the case of *Epstein v. United States, supra.*

In the case of *Parr, et al v. United States*, 363 U.S. 370, the Supreme Court reversed the judgment and convictions obtained from alleged violation of 18 U.S.C. 1341. There the Supreme Court held: Although the indictment charged, and the evidence tended to show, that petitioners devised and practiced a scheme to defraud the school district by misappropriating and embezzling its money and property, neither the indictment nor the evidence supports the judgment, because the indictment did not charge and evidence did not show, any use of the mails "for the purpose of executing such scheme" within the meaning of 18 U.S.C. 1341.

The record before this Court, therefore, demonstrates beyond question that the trial court failed to properly instruct the jury on the issue of "aiding and abetting" within the meaning of 18 U.S.C. 1341.

CONCLUSION

Wherefore, and by reason of the foregoing, Appellants strenuously urge this Court to reverse their convictions evidenced by the judgment entered below, and remand the same for a new trial.

Respectfully submitted,

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INDEX TO APPELLANT'S APPENDIX

APPELLANT'S APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on September 2, 1969

United States of America	:	Criminal Case No. 1981-69
v.	:	Grand Jury No. Original
Marino J. Maturo, Louis P. Vecchiarello, also known as Luigi Vecchiarello DeRoussi, Anthony V. Vecchiarello, also known as Neely Vecchiarello, Anthony DeRuosa Dante and as Anthony DeRosa	:	Violations: 18 U.S.C. 1343 (Wire Fraud) 18 U.S.C. 1341 (Mail Fraud) 22 D.C. Code 140 (Uttering Forged Documents) 18 U.S.C. 2 (Aiding and Abetting) 22 D.C. Code 105 (Aiding and Abetting)

The Grand Jury charges:

INDICTMENT

(COUNTS 1 through 28)

1. From on or about October 1, 1965, and continuously thereafter up to and including the date of the filing of this indictment, in the District of Columbia and elsewhere, Marino J. Maturo, Louis P. Vecchiarello, also known as Luigi Vecchiarello DeRoussi, and Anthony V. Vecchiarello, also known as Neely Vecchiarello, Anthony Vincent DeRuosa, Anthony DeRuosa Dante and Anthony DeRosa, defendant herein, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud,

Cynthia Wiggins, Doris Gooding, Reece Lloyd, Doris Harris, William Berry, Joyce Lynn, John Stanley, Mary Russell, Iris Mae Scalise,

Esther Rankins, Jack Poms, Theodore Holmes, Dorothy Ellison, Cynthia Dyson, Rosa Mae Collins, Deborah Goveart, Clara Carter, Peggy Tonsler, Betty Bethea, Debra Blanchard, Patricia Smith, Bonnie Robinson, Juanita Jones, Louise Johnson, William Washington, Joyce Jones, Richard Smith, Lola Watts, Barbara Green, Robert Leroy McLeod, Branda Brent, Lillian Eure, Mario Juliano, Jonna Longmere, Louette Gussie, Geraldine K. Singleton, Beverly Ross, Dora Vines, Charlene Arnold, Kenneth Johnson,

and divers other persons too numerous to mention and persons who are to the Grand Jury presently unknown, herein collectively referred to as the "patients", each and all of whom were members of and constituted a class of persons whom the Defendants believed could be induced to avail themselves of the Defendants' purported medical and health services, that is, the examination, prescription and treatment of patients, and to obtain money and property by false and fraudulent pretenses, promises and representations which the Defendants well knew would be and were false when made.

2. It was a further part of said scheme and artifice to defraud that the Defendants would and did hold themselves out to be graduates of Mexican Medical Schools and would and did hold themselves out to be physicians duly licensed in Mexico.

3. It was a further part of said scheme and artifice to defraud that the Defendants, without licenses or medical qualifications, would and did become employed as unlicensed physicians in the State of Maryland.

4. It was a further part of said scheme and artifice to defraud that the Defendants would and did pervert, abuse and undermine the District of Columbia licensing provisions which provide for the licensing, without examination, of physicians by reciprocity with certain foreign nations, and the Defendants would and did achieve this by submitting false and fraudulent applications and credentials to the Department of Occupations and Professions of the District of Columbia Government ("Department") to obtain licenses to practice medicine

and surgery in the District of Columbia without submitting to examinations of their scientific and medical knowledge.

5. It was a further part of said scheme and artifice to defraud that the Defendants would and did swear and affirm to the truth of and state as true. the matters contained in the aforementioned applications knowing them to be false for the purpose of evading and frustrating subchapter I of Title 2, D.C. Code, relating to the regulatory provisions for licensure to practice medicine and surgery in the District of Columbia.

6. It was a further part of said scheme and artifice to defraud that the Defendants would and did pass, utter and publish to the Department and others as true and genuine purported diplomas, scholastic records and credentials from Mexican schools which the Defendants knew had been falsely made and forged and would and did obtain recommendation letters from accommodating persons who were not aware of Defendants' lack of medical qualifications and background.

7. It was a further part of said scheme and artifice to defraud that the Defendants would and did obtain licenses to practice medicine and surgery in the District of Columbia in the names of Marino J. Maturo and Louis P. Vecchiarello, and would and did attempt to obtain a license to practice medicine and surgery in the District of Columbia in the name of Anthony Vincent DeRuosa, all for the purpose of impersonating physicians in the District of Columbia.

8. It was a further part of said scheme and artifice to defraud that the Defendants would and did obtain certification by the Board of Credentials of the District of Columbia Medical Society for Marino J. Maturo and Louis P. Vecchiarello.

9. It was a further part of said scheme and artifice to defraud that the Defendants would and did obtain telephone secretarial service with the District of Columbia Medical Bureau, and would and did participate in the Medical Bureau's emergency call service program.

10. It was a further part of said scheme and artifice to defraud that the Defendants would and did insert the name of Marino J. Maturo and Louis P. Vecchiarello with the heading, "Physicians and Surgeons, M.D." in the yellow pages of the published telephone directory for the Washington, D.C. Metropolitan area.

11. It was a further part of said scheme and artifice to defraud that the Defendants would and did become participants as physicians in Medical Service of the District of Columbia which provides group health insurance and professional medical services to patients on a subscriber basis, and would and did become participants as physicians in the federal health insurance program for the aged pursuant to Title 12 of the Social Security Act popularly known as Medicare.

12. It was a further part of said scheme and artifice to defraud that the Defendants would and did obtain narcotic registration numbers as physicians from the United States Treasury Department which would and did enable the Defendants to purchase narcotics.

13. It was a further part of said scheme and artifice to defraud that the Defendants would and did lease and operate an office at 2412 Minnesota Avenue, S. E. in the District of Columbia purportedly to examine, treat and prescribe for patients.

14. It was a further part of said scheme and artifice to defraud that the Defendants would and did operate a second office at 860 4th Street, S. W. in the District of Columbia purportedly to examine, treat and prescribe for patients which they would and did name the "Southwest Medical Center".

15. It was further part of said scheme and artifice to defraud that the Defendants would and did hold themselves out as specializing in Bariatrics, a medical discipline dealing with the scientific problems encountered in human weight reduction and diet control.

16. It was a further part of said scheme and artifice to defraud that the Defendants would and did obtain "courtesy privileges" for the general practice of medicine at Morris Cafritz Memorial Hospital, Washington, D.C., for Marino J. Maturo and Louis P. Vecchiarello.

17. It was a further part of said scheme and artifice to defraud that the Defendants, impersonating physicians and utilizing the facilities, privileges and resources enumerated in the foregoing paragraphs of this Count of the Indictment, would and did obtain the confidence of patients who would and did allow themselves to be examined, treated and prescribed for by the Defendants, and the Defendants would and did purport to examine, treat, and prescribe for said patients and would and did charge said patients money for the purported examinations, treatments and prescriptions.

18. It was a further part of said scheme and artifice to defraud that as a part of said examinations, treatments and prescriptions for patients the Defendants would and did without regard to medical need, extract, draw and obtain blood, urine and other specimens from patients and send them to the National Clinical Services Laboratories, Inc., Arlington, Virginia and other laboratories for analysis, and would and did charge patients amounts in excess of the laboratories' charges for the analyses.

19. It was a further part of said scheme and artifice to defraud that as a part of operating a purported medical and health practice, the Defendants would and did purchase narcotics, drugs, medicine, and syringes and would and did dispense narcotics, drugs and medicine to patients.

20. It was a further part of said scheme and artifice to defraud that the Defendants would and did cause false, forged and fraudulent letters and documents to be transmitted to the Department to lull the Department into inaction and to impair, hinder, and impede the Department's investigation of the Defendants' medical credentials and fitness to practice medicine in the District of Columbia.

21. It was a further part of said scheme and artifice to defraud that the Defendants would and did knowingly and wilfully make and cause to be made, false and fraudulent pretenses, promises and representations well knowing at the time that such would be and were false when made, including, but not limited to, the following:

a) That the Defendants were physicians.

b) That the defendants attended and graduated from accredited medical schools at the University of Guadalajara and the University of Yucatan in Mexico.

c) That the Defendants were licensed as physicians in Mexico.

d) That the Defendants had taken and passed medical examinations in Mexico on certain specified dates and at certain specified places.

22. It was further part of said scheme and artifice to defraud that the Defendants would and did, knowingly and wilfully, cause to and did conceal from patients, the Department and others the following:

a) That the Defendants had not attended, graduated or received diplomas from the University of Guadalajara and University of Yucatan Medical Schools.

b) That the Defendants had not been licensed as physicians in Mexico.

c) That the Defendants had failed or not taken the foreign medical graduate's qualifying examination administered by the Educational Council for Foreign Medical Graduates.

d) That the Defendants had not interned or served a residency at a teaching hospital.

e) That the Defendants had obtained licenses to practice medicine in the District of Columbia on false and forged credentials.

f) That the Defendants' charges to patients for laboratory services were substantially in excess of the laboratories' charges for such services.

23. On or about the dates hereinafter specified in Counts 1 through 8, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, the Defendants in the District of Columbia unlawfully, wilfully and knowingly did transmit and cause to be transmitted in interstate commerce by means of wire communications, sounds, to wit, telephone calls between the Medical Bureau located in the District of Columbia at 2007 I Street, N. W., and the hereinafter specified place in Maryland:

Count	Date of Transmission	Maryland Location
1	June 14, 1969	Marlow Heights, Maryland (re June E. Wright)
2	June 15, 1969	Camp Springs, Maryland (re Kay Walker)
3	July 23, 1969	Suitland, Maryland (re Gayle Reynolds)
4	August 7, 1969	Suitland, Maryland (re Josephine Evans)
5	August 23, 1969	Oxon Hill, Maryland (re Betty Cole)
6	October 16, 1969	Bowie, Maryland (re Louise Tatum)
7	October 26, 1969	Deerpark Heights, Maryland (re Iris Mae Scalise)
8	October 31, 1969	Ritchie, Maryland (re Ruth Mallory)

24. On or about the dates hereinafter specified in Counts 9 through 18, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, the Defendants in the District of Columbia unlawfully, wilfully and knowingly caused to be delivered by the United States Mails according to the directions thereon:

Count	Date of Mailing	Addressee
9	March 2, 1967	Department of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.
10	September 6, 1967	Department of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.
11	October 26, 1967	Revenue Division Government of District of Columbia Washington, D. C.
12	October 31, 1967	Department of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.
13	June 17, 1969	Credential Service (Mexico) International Education Relations, Division of International Education, U.S. Office of Education, Washington, D. C.
14	July 7, 1969	Office of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.
15	November 24, 1969	Medical Services, 2007 I Street, N. W. Washington, D. C.
16	December 9, 1969	Bureau of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.
17	December 9, 1969	Bureau of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.

Count	Date of Mailing	Addressee
18	December 9, 1969	Bureau of Occupations and Professions, 1145 – 19th Street, N. W. Washington, D. C.

25. On or about the dates hereinafter specified in Counts 19 through 28, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, the Defendants unlawfully, wilfully and knowingly did place and cause to be placed in the Post Office and authorized depositories for mail, matter within the District of Columbia to be sent and delivered by the United States Post Office according to the directions thereon, certain matters and things addressed as hereinafter specified:

Count	Date of Mailing	Addressee
19	August 3, 1967	Louis P. Vecchiarello, 3803 St. Barnabas Road, S. E. Washington, D. C.
20	November 2, 1967	Vincent J. Lozowicki, Bureau of Narcotics, 103 South Gay Street Baltimore, Maryland
21	September 12, 1968	Louis P. Vecchiarello, 2412 Minnesota Avenue, S. E. Washington, D. C. (re Wright)
22	September 24, 1968	U.S. Treasury Department, Internal Revenue Service, Baltimore, Maryland
23	September 27, 1968	Louis P. Vecchiarello, 2412 Minnesota Avenue, S. E. Washington, D. C. (re Wright)
24	October 16, 1968	Marino J. Maturo, 2412 Minnesota Avenue, S. E. Washington, D. C. (re Taylor)

Count	Date of Mailing	Addressee
25	November 15, 1968	Marino J. Maturo, 2412 Minnesota Avenue, S. E. Washington, D. C. (re Krebeck)
26	December 24, 1968	Marino J. Maturo, 2412 Minnesota Avenue, S. E. Washington, D. C. (re Weaver)
27	December 24, 1968	Louis P. Vecchiarello, 2412 Minnesota Avenue, S. E. Washington, D. C. (re Brooke)
28	November 19, 1969	Rick Tatum, 123-18 Kembridge Drive, Bowie, Maryland

(Violation, 18 U.S.C. 1343, 1341 and 2)

COUNT 29

On or about February 14, 1967, within the District of Columbia, Louis P. Vecchiarello and Marino J. Maturo, with intent to defraud, passed and uttered to Joseph Sarnella of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of qualifications purportedly issued by the University of the South-East, Merida, Yucatan, Mexico, on May 28, 1964, to Luigi Vecchiarello DeRoussi, well knowing the aforesaid qualifications to be falsely made and forged.

(22 D.C. Code 1401; 105)

COUNT 30

On or about February 14, 1967, within the District of Columbia, Louis P. Vecchiarello and Marino J. Maturo, with intent to defraud, passed and uttered to Joseph Sarnella of the Department of Occupations and Professions of

the District of Columbia Government, as true and genuine, a falsely made and forged test result of the theoretical and practical tests of the general examination as physician surgeon of Luigi Vecchiarello DeRoussi, purportedly taken on May 14, 1964 in the City of Merida, Yucatan, Mexico, well knowing the aforesaid test result to be falsely made and forged.

(22 D.C. Code 1401: 105)

COUNT 31

On or about February 14, 1967, within the District of Columbia, Louis P. Vecchiarello and Marino J. Maturo, with intent to defraud, passed and uttered to Joseph Sarnella of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged physician surgeon degree to Luigi Vecchiarello DeRoussi dated June 23, 1964, purporting to be from the University of Yucatan Medical School at Merida, Yucatan, Mexico, well knowing the aforesaid physician surgeon degree to be falsely made and forged.

(Violation, 22 D.C. Code 1401 and 105)

COUNT 32

On or about September 15, 1967, within the District of Columbia, Marino J. Maturo and Louis P. Vecchiarello, with intent to defraud, passed and uttered to Annette Jackson of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of a purported certificate of studies of physician surgeon issued to Marino Joseph Maturo on December 18, 1964, by the University of Guadalajara, Jalisco, Mexico, well knowing the aforesaid certificate to be falsely made and forged.

(22 D.C. Code 1401; 105)

COUNT 33

On or about September 15, 1967, within the District of Columbia, Marino J. Maturo and Louis P. Vecchiarello, with intent to defraud, passed and uttered to Annette Jackson of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of a purported certificate of professional examinations issued to Marino J. Maturo on December 14, 1964, by the University of Guadalajara, Jalisco, Mexico, well knowing the aforesaid certificate to be falsely made and forged.

(22 D.C. Code 1401; 105)

COUNT 34

On or about September 15, 1967, within the District of Columbia, Marino J. Maturo and Louis P. Vecchiarello, with intent to defraud, passed and uttered to Annette Jackson of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of a purported degree of physician surgeon conferred on Marino Joseph Maturo on February 5, 1965, by the University of Guadalajara, Jalisco, Mexico, well knowing the aforesaid certificate to be falsely made and forged.

(22 D.C. Code 1401; 105)

COUNT 35

On or about June 3, 1969, within the District of Columbia, Anthony V. Vecchiarello, Louis P. Vecchiarello and Marino J. Maturo, with intent to defraud, passed and uttered to Clark Coleman of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of a purported certificate of professional examination for physician surgeon issued to Anthony DeRuosa Dante on April

26, 1968, by the University of Guadalajara, Jalisco, Mexico, well knowing the aforesaid certificate to be falsely made and forged.

(22 D.C. Code 1401; 105)

COUNT 36

On or about June 3, 1969, within the District of Columbia, Anthony V. Vecchiarello, Louis P. Vecchiarello and Marino J. Maturo, with intent to defraud, passed and uttered to Clark Coleman of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of a purported certificate of studies of the school of medicine issued to Anthony DeRuosa Dante on October 26, 1968, by the University of Guadalajara, Jalisco, Mexico, well knowing the aforesaid certificate to be falsely made and forged.

(22 D.C. Code 1401; 105)

COUNT 37

On or about June 3, 1969, within the District of Columbia, Anthony V. Vecchiarello, Louis P. Vecchiarello and Marino J. Maturo, with intent to defraud, passed and uttered to Clark Coleman of the Department of Occupations and Professions of the District of Columbia Government, as true and genuine, a falsely made and forged copy of a degree of physician surgeon conferred on Anthony DeRuosa Dante on November 30, 1968, by the University of Guadalajara, Jalisco, Mexico, well knowing the aforesaid certificate to be falsely made and forged.

(22 D.C. Code 1401; 105)

Attorney of the United States
in and for the District of
Columbia.

A True Bill:

Foreman.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

* * * *

Date	Proceedings
1969	
Dec. 23	Indictment. filed: 37 COUNTS.
Dec. 24	1: B/W Ordered & Issued 12-23-69; returned executed; Deft. Comm.: COMM. ISSUED.
Dec. 30	2: Appearance of John Alvin Croghan as counsel. Record of proceedings before U.S. Mag. Burnett for BAIL ONLY. Bond set at $10.000. Order. filed. Recognizance in the sum of $10,000 taken with L. Weinstein. filed.
Dec. 31	1: Praecipe ent. appl. of John A. Croghan, Esq., as counsel for the Deft. Record on proceedings before the U.S. Mag. for BAIL ONLY. Bond set at $10.000. DOYLE, M. App. bond in the amount of $10.000 taken with L. Weinstein. Deft. Rel.
1970	
Jan. 6	1 & 2: ARR: PNG: MO's., Feb. 6, 1970; hearing, Feb. 13, 1970; bond. No. 2: John A. Croghan, Esq., SMITH, J. (Rep.-D. Spencer) C/F.
Jan. 6	EACH: MO. of Deft. LOUIS VECCHIARELLO to reduce amount of bond. C/S; MO. of Deft. MARINO JOSEPH MATURO to reduce amount of bond; NOTICE of hearing of MO. of Louis Vecchiarello to reduce bond. C/S; MEMO of P&A in support. C/S; NOTICE of hearing of MO. of Marino Maturo to reduce bond. C/S; MEMO of P&A in support. C/S.
Jan. 22	3: Rec. of Pro. 1-21-70 before Mag. Doyle for the purpose of BAIL ONLY. Bail fixed at $10,000. RECOGNIZANCE in the sum of $10,000 taken with L. Weinstein, Surety. Appearance of John Alvin Croghan, filed.
Jan. 23	3: B/W ISSUED 12-23-69; returned executed. Deft. surrendered – released on bond, 12-21-69.
Jan. 28	3: (VECCHIARELLO) ARR: PNG; MO's. by 2-27-70; Govt. 10 days to reply; all motions in case to be heard 3-16-70. C/F J. Croghan, Esq. (Rep.–Copeland); SMITH, J.
Feb. 4	1, 2, 3: App. of Herbert S. Siegal as retained co-counsel for Deft. with John Croghan, Esq.

Date	Proceedings
1970 (cont'd)	
Feb. 27	1, 2, 3: MO. for Bill of Particulars; C/S; P&A. MO. to Dismiss; C/S; P&A. MO. for Discovery & Inspection; C/S; Affidavit; P&A.
Mar. 9	1, 2, 3: Affidavits (2) in support of MO's., filed on 2-27-70. C/S.
Mar. 11	1, 2, 3: P&A in opposition to MO. for Bill of Part.; P&A in opposition to MO. to Dismiss Indict.; Govt. MO. for Reciprocal and Contemporaneous Discovery and Inspection: P&A. P&A in opposition to Deft's Motion for Discovery and Inspection. C/S.
Mar. 16	1, 2, 3: MO. for Bill of Particulars withdrawn by Deft.; MO. for Bill of Particulars withdrawn by Deft. with exception of Para's 3, 4, 25 and 26, which were heard and denied.; MO. to Dismiss heard as to Para's 3, 5 and 7 only, and denied; MO. for Reduction of Bond heard and denied; MO. of Govt. for Reciprocal Contemporaneous Discovery and Inspection held in abeyance pending pretrial hearing; Pretrial conf., June 4, 1970; trial date, June 8, 1970. C/F. SMITH, J.: Rep.-M. Miller; No. 1, Croghan, Esq.
Apr. 10	1, *et al.* TR. of PRO. of 3-16-70, pages 1-22; Court copy; Rep.-Miller.
May 12	1, 2: App. of Edward J. Menard entered for Defts. 1, 2.
May 15	1, 2: Motion for Continuance; FIAT, SMITH, J. HEARD ex-parte and DENIED. (N).
May 28	1, 2, 3: (1 & 2): Motion of J. A. Croghan, Esq., to withdraw as counsel, HEARD and GRANTED. Edward J. Menard, Esq., appears for these Defts. Renewed Motion of Defts. for trial continuance, DENIED.
May 28	3: Herbert Siegal, Esq. (of N.Y.C.) enters appearance for Defts.
May 28	1, 2, 3: At trial, Court will allow Govt. 9 challenges and Defts. a total of 15; each Deft. may have 5 if desired; Motion to Dismiss and Motion to Sever are set for hearing, Thursday, June 4th, with service to be on Govt. by Monday, June 1st. (AUSA Glanzer, all defense counsel and Defts. 1 & 3 present; Deft. No. 2 waives right to be present and is absent). J. A. Croghan, Esq., E. J. Menard, Esq., H. Siegal, Esq.; SMITH, J. Rep.-D. Copeland.
May 28	Order granting leave to John Alvin Croghan, Esq., to withdraw as counsel for Defts., Marino J. Maturo & L. P. Vecchiarello. (N) SMITH, J. Rep.-D. Copeland (N).
May 28	3: MO. to Sever; P&A; FIAT, SMITH, J.

Date	Proceedings
1970 (cont'd)	
June 4	1, 2, 3: Pretrial hearing: Deft. No. 3 waives right to be present: Defts. 1 & 2 present: Motions to Sever HEARD and DENIED as to all Defts: Oral Motion to Dismiss All Counts Charging Fraud. DENIED. Trial will proceed on June 8, 1970. 1 & 2: E. Menard, Esq. 3: H. Siegal, Esq. SMITH, J. Rep.-D. Copeland.
June 4	3: Govt's Memorandum in Opposition to Deft's Motion to Sever; Memorandum – in re: Evidence.
June 4	1: Govt's Memorandum – in re: Evidence.
June 8	MATURO, *et al.*: MO. of John Alvin Croghan, Esq., to withdraw as counsel: C/S. Exhibits A and B (filed as of May 28, 1970). SMITH, J.
June 8	1, 2, 3: Jurors sworn on voir dire; jury and four alt. jurors sworn; testimony heard in part; respited until 10:00 a.m., June 9, 1970; Bond. Stipulation (No. 1); Stipulation (No. 2); Exhs. A and B; Amendment to Stipulation No. 2. SMITH, J. Rep.- No. 1 & 2, E. Menard, Esq.: No. 3, H. Siegal, Esq.
June 9	1, 2, 3: TRIAL RESUMED; same jury and alternate jurors; further testimony heard; respited until 10:00 a.m., June 10, 1970. 1, 2: Edward J. Menard. 3: Herbert S. Siegal, Esq. SMITH, J. Rep.-D. Copeland.
June 10	1, 2, 3: TRIAL RESUMED; juror No. 1, Ethel D. Smith, excused from further service in this case; alternate No. 1, Willia M. Felton takes seat of Juror No. 1; further testimony heard; respited until 10:00 a.m., June 11, 1970. 1, 2: Edward J. Menard, Esq. 3: Herbert S. Siegal, Esq. SMITH, J. Rep.-D. Copeland.
June 11	1, 2, 3: TRIAL RESUMED; same jury and alternate jurors; further testimony heard; respited until 10:00 a.m., June 12, 1970. 1, 2: Edward J. Menard, Esq. 3: Herbert S. Siegal, Esq.
June 12	1, 2, 3: TRIAL RESUMED; same jury and alternate jurors; further testimony heard; Counts 14, 16, 17 and 18 dismissed on oral Motion of Govt.; respited until 9:30 a.m., June 15, 1970. Stipulations (Nos. 3, 4 and 5). 1, 2: Edward E. Menard, Esq. 3: Herbert S. Siegal, Esq. SMITH, J. Rep.-D. Copeland.
June 15	1, 2, 3: TRIAL RESUMED; same jurors and three alternate jurors; argument of counsel and charge of Court heard; alternate jurors discharged; JURY RETIRES to deliberate; jury excused to return at 9:00 a.m., June 16, 1970 for further deliberations; bond. Note from Jury. 1, 2: Edward J. Menard, Esq. 3: Herbert S. Siegal, Esq.
June 16	1, 2, 3: JURY RETURNS into Court for further deliberation; accommodations for 12 jurors and 2 Marshals ordered and issued.

Date	Proceedings
1970 (cont'd)	
June 16 (cont'd)	VERDICT: No. 1: Marino J. Maturo. GUILTY as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37; FINDING DEFT. No. 2, Louis P. Vecchiarello, GUILTY as to Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 and 37; FINDING DEFT. No. 3, Anthony V. Vecchiarello, GUILTY as to Counts 1, 2, 3, 4, 5, 6, 7, 9, 11, 15, 19, 20, 21, 22, 23, 24, 35, 36 and 37; Jury polled and discharged; Oral Motion of Govt. to revoke bonds of each Defendant GRANTED. Defts. Ref. and COMM; COMM. ISSUED. Proposed instruction of Deft. Note from jury. Written VERDICT. 1, 2: Edward J. Menard, Esq. 3: Herbert S. Siegal, Esq. SMITH, J. Rep.-D. Copeland.
June 17	1, 2, 3: Notice of Appeal from Revocation of bond, 6-16-70; $5.00 paid and credited to U.S. 1, 2, 3: Order granting Motion of Govt. that Defts. be committed pending sentencing. SMITH, J. 1, 2, 3: TR. of PRO. of June 16, 1970; Motion for Bond, pages 1-20; Court's copy; Rep.-D. Copeland.
June 17	1, 2, 3: Copy of docket entries sent to USCA & U.S. Atty. Copy of Notice of Appeal sent to USCA, U.S. Atty. and Defts.
June 19	1, 2, 3: Record on Appeal delivered to USCA; deposit by Edward Menard, $1.55 ($1.55 paid and credited to U.S.). Receipt from USCA for orig. record filed.
July 22	1, 2, 3: Praecipe entering app. of Leroy Nesbitt of 1140 Connecticut Avenue, N. W. as retained counsel. Praecipe entering app. of Donald Chaikin of 1225 Connecticut Avenue, N. W. as retained counsel. Motion for new trial and in arrest of judgment. Attachments (3), filed.
July 30	1, 2, 3: EACH: MO. for new trial DENIED; oral MO. to reconsider denial of bond pending sentence DENIED; oral MO. of Defts. to leave jail in custody of Marshal to close offices DENIED; rem. copy of receipt signed by Edward J. Menard, dated 5/9/70. SMITH, J. Rep.-D. Copeland. L. Nesbitt & J. Chaiken, Esqs.

MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT

The defendants, by and through their attorneys, Leroy Nesbitt and Donald Chaikin, move the Court to arrest the judgment and grant them a new trial for the following reasons:

1. That the defendants were ineffectively represented by Counsels, as per the attached affidavits prayed to be read as a part hereof.

2. For such other and further relief as may be advanced at the hearing of this motion.

Respectfully submitted,

/s/ Donald J. Chaikin
1225 Connecticut Avenue, N. W.
Washington, D. C.

/s/ Leroy Nesbitt
1140 Connecticut Avenue, N. W.
Washington, D. C.
Attorneys for the Defendants

AFFIDAVIT

I, Louis P. Vecchiarello, being duly sworn, depose and say:

I am one of three defendants who were convicted in a case entitled "United States against Louis P. Vecchiarello, *et al.*" On December 6, 1969, prior to my indictment, which was December 23, 1969, I retained an attorney, Mr. John Alvin Crogan to represent me while I was the subject of an investigation by the United States Attorney's Office. This lawyer was recommended to me by one Dr. Biscardi, who was the client of Mr. Crogan for a similar purpose. I paid Mr. Crogan $10,000.00 because he repeated to me that I had a very serious problem, and because of his personal and close relationship with Mr. Flannery, United States Attorney for the District of Columbia, and speaking to

Mr. Glanzer, United States Assistant Attorney, on behalf of Dr. Biscardi, he was in a "nice position" and see to it that I would be relieved of any liability and continue to practice medicine.

From the time I retained him until he was discharged sometime in May 1970, his only calls to me concerned my fee. Nothing was ever discussed for my defense in the event I was subject to criminal liability, which I was by my indictment subsequent to my retention.

I retained a Mr. Herbert Siegal, 17 John Street, New York, New York, on December 12, 1969, and paid him initially $8,000.00 and then an additional $16,667.00 to engage other counsel for me; namely, Mr. William T. Sherwood, whom Mr. Siegal represented to me to be a very prominent criminal attorney in Washington, D. C.

During the early part of May 1970, I first saw a Mr. Menard, who stated to me that Mr. Siegal had sent him and that he and Mr. William T. Sherwood, Jr. would act as counsel for myself and Marino Maturo He asked me to sign a prepared letter, which I did, to release Mr. Crogan as my attorney and engaging William T. Sherwood, Jr. and Mr. Menard as my counsel. I was led to believe that I had able and competent counsel, especially Mr. Sherwood, since prior to this time I had never heard Mr. Menard's name mentioned to me by Mr. Siegal. In fact, I later discovered that Mr. Menard was not listed in the Washington, D. C. telephone directory at all, let alone as an attorney. Mr. Siegal told me that he would represent, for the record, Anthony Vecchiarello, my brother and co-defendant, and that Mr. Menard and Mr. Sherwood would represent myself and Mr. Maturo. He stated that all three attorneys would be acting as co-counsel for all three.

When our trial first opened on June 8, 1970, I noted Mr. Sherwood's absence to both Mr. Siegal and Mr. Menard. They informed me that he would show up the next day and that his presence was not necessary until the formal opening of the government's case. Mr. Sherwood did come to court and sat at the defense table. He was challenged by Mr. Glanzer, through the Court,

as to his status in the instant case and Mr. Sherwood stated that he was not a member of the D. C. Bar nor had he any interest in our case whatsoever and his only purpose in coming to court was to watch Mr. Siegal "try a case." Thereupon, the Court requested Mr. Sherwood to occupy a seat in the spectators' pews. Again, neither Mr. Menard nor Mr. Siegal gave me an assuring or satisfactory answer. They repeatedly said everything, "Is all right so don't worry about it." This caused me great concern.

I was interrogated by Mr. Siegal for one week in New York City, going over my defense and, at that time, I gave him numerous witnesses he should call. Some of these were Mexican nationals. I felt confident thereafter that I had and still have a competent and adequate defense. It came as a great surprise and shock to me on the Sunday, June 14, 1970, the day before my defense was to have been put on, that Mr. Menard and Mr. Siegal arbitrarily and refused to put on my defense.

At all time from the date of my indictment to the date of my conviction. I practiced medicine under the advise of counsel throughout and also by the refusal of Judge Waddy during March 1970 to suspend my license.

/s/ Louis P. Vecchiarello

/s/ Wilma E. Wills
Notary Public, July 16, 1970.

My Commission Expires November 14, 1974.

STATEMENT OF FACTS

I, Marino J. Maturo, was introduced to a Mr. John Alvin Croghan, Esq., by one Dr. Biscardi on December 6th, 1969, at the Prince Georges Motor Hotel, Silver Hill, Maryland. My associate, Dr. Vecchiarello, was present at this interview. Mr. Croghan stated that we were in serious trouble with the U.S. Attorneys' Office and, that we were under investigation by the Grand

Jury. He further stated that he was in "close personal" contact with the U.S. Attorneys, Mr. Flannery and Mr. Glanzer, due to his representing Dr. Biscardi, also currently being investigated by the Grand Jury and Mr. Glanzer. Mr. Croghan then stated that he would handle this serious problem for a fee of $15,000.00. This fee would cover both myself and my associate, Dr. Vecchiarello. On December 8th, 1969, we paid Mr. Croghan a retainer of $3,000.00. After turning over to Mr. Croghan all documents, statements and a list of persons who could testify in our defense to establish our authenticity and medical competence, Mr. Croghan's main concern was the balance of his fee. During the week of December 8th, 1969, and up until the time he was discharged from our case, Mr. Croghan's efforts were seemingly confined to telephoning me requesting further payments. On December 15, 1969, I retained Mr. Siegal, a New York attorney, who requested copies of all material given to attorney Croghan. Mr. Croghan refused to release said documents. On December 23rd, 1969, I was arrested. Mr. Croghan appeared at my bond hearing and at that time requested that I sign an agreement to retain him for this case. The fee he now asked was raised to $20,000.00. He further represented that Dr. Vecchiarello had agreed to this fee. Upon leaving the jail, I was advised by my counsel, Mr. Croghan, that I should return to my office and continue my practice. On March 17th, 1970, Mr. Croghan appeared before Judge Waddy on civil action for an injunction on our license to practice medicine. Mr. Siegal, being ill, could not appear. At that time, the court refused to remove our license. Again, under advice of counsel, I returned to my office.

About May 1970, after meeting with Mr. Croghan, Mr. Siegal suggested that Mr. Croghan be discharged from this case. The reasons he gave were that he believed that Mr. Croghan was, at the least, unprepared to defend our case after working on it since early December. Mr. Siegal then told me that my "share" of his fee would be $8,000.00. He later asks if the three defendants, myself included, could raise $50,000.00 in cash. When I questioned him as to why payment must be in cash and not certified check he said that "that is the way it has to be." My share, which was paid in cash before June 8th,

1970, was $16,667.00. He stated that a Mr. William T. Sherwood, Esq., would be our counsel. About May 20th, a Mr. Menard, Esq., appeared at our offices and stated that Mr. Siegal had sent him and that he also was going to represent us. We then signed the letter discharging Mr. Croghan. This letter also stated that we were retaining Messrs. Sherwood and Menard in his stead.

The documents pertaining to our defense were turned over to Mr. Menard.

When the trial began, we questioned Messrs. Siegal and Menard as to the whereabouts of Mr. Sherwood. They told us not to worry, that he would appear. On the second day he appeared, only to be removed from the defense table when challenged by Mr. Glanzer and the court as to his right to sit as counsel in the District of Columbia. He stated that he was only there to "watch Mr. Siegal in action." He was then told to take a seat in the spectators' gallery. When we questioned Mr. Siegal and Mr. Menard about this, they told us not to worry, they knew what they were doing. At the end of the government's presentation, we met with Messrs. Siegal and Menard in regard to our defense. At this late stage, our counsel told us to have subpoenas served for our witnesses, some as far away as Mexico.

On Monday, June 15th, when our defense was to be presented, our counsel advised us that they "need present no defense as the U.S. Attorney has presented no case against us." Believing this, we were persuaded by our attorneys not to present any defense.

Throughout this case, all our attorneys had documents and witnesses who, if presented in our defense, could have shown the government's accusations as false but, our counsel declined to use these facts.

Throughout this entire case, we were advised by our counsel to continue our practice of medicine.

Throughout this case, I, myself, have spent in excess of $30,000.00, most of which had to be borrowed.

I swear that the above facts are true.

/s/ Marino J. Maturo

/s/ Wilma E. Wills
Notary Public

My Commission Expires November 14, 1974.

AFFIDAVIT

I, Anthony Vecchiarello, being duly sworn, depose and say:

1. I was represented by Herbert M. Siegal during my criminal trial. I retained him during the early part of January 1970.

2. Mr. Siegal, thereafter, during the early part of April, advised me that he would represent me only and that he would engage other counsel for my brother, Louis Vecchiarello, and Marino Maturo. He told me he needed $50,000.00 more in cash to hire William T. Sherwood, Jr., of Washington, D. C. This $50,000.00 was to be split in three ways between the three defendants. When I inquired about the cash payment, he told me that's how it had to be. Since he was my lawyer I did not question him further. A friend of mine committed my payment, since I had no such funds. He assured me that having Mr. Sherwood as co-counsel, we would relieved of this indictment. He spoke of Mr. Sherwood as a great attorney in this type of criminal action.

3. I had, during such retention and before trial, . . . Mr. Siegal a my defense witnesses. I felt and still believe I had an adequate defense.

4. I first saw Mr. Sherwood in Court three days after trial starting and when I heard that he was not a member of D. C. Bar and, further, that he had no interest in our case, I became suspicious and inquired of Mr. Menard and Mr. Siegal what was happening. They informed me that there was nothing to worry about. I didn't agree with them because of my legal background. I argued with them constantly thereafter and more so when they told me Monday

morning. June 15. 1970. that they were going to put in no defense. I knew for a fact tentative plans were made by my brother to bring in Mexican witnesses and others.

5. Because of my legal background. I knew that we must answer the government's case. However. I could not do so because of my attorney and the limited time left to bring in Mexican witnesses.

6. I was present during the month of May. 1970. when Mr. Siegal received $16.667.00 in cash from Louis Vecchiarello and Marino Maturo as part payment toward the $50.000.00 cash additional fee.

7. I was present when Mr. Siegal, in his office, in New York, interrogated Louis P. Vecchiarello about his defense. This took one working week, five to six hours a day. He assured us both we had good defenses and the government could not get a conviction!

/s/ A. P. Vecchiarello

/s/ Wilma E. Wills
Notary Public, July 16. 1970.

My Commission Expires November 14, 1974.

JUDGMENT AND COMMITMENT
(Defendant No. 1, Marino J. Maturo)

On this 15th day of October, 1970, came the attorney for the government and the defendant appeared in person and by his counsel, Leroy Nesbitt and Donald Chaikin, Esquires.

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of

WIRE FRAUD, in violation of 18 U.S. Code, Section 1343, as charged in Counts 1 thru 8;

MAIL FRAUD, in violation of 18 U.S. Code, Section 1341, as charged in Counts 9, 10, 11, 13, 15, 19 thru 26 and 28;

UTTERING FORGED DOCUMENTS, in violation of 22 D.C. Code, Section 1401, as charged in Counts 29 thru 37,

and the court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of (footnotes omitted)

FIVE (5) YEARS, pursuant to Title 18, U.S. Code, Section 4208(a2) on each of Counts 1 thru 8, said sentences to run concurrently by the Count:

FIVE (5) YEARS on each of Counts 9, 10, 11, 13, 15, 19 thru 26 and 28, said sentences to run concurrently by the Count but consecutively to sentence on Counts 1 thru 8;

THREE (3) YEARS to TEN (10) YEARS on each of Counts 29 thru 37, said sentences to run concurrently by the Count and concurrently with sentences imposed on Counts 1 thru 8.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Lewis Smith, Jr.
United States District Judge

JUDGMENT AND COMMITMENT

(Defendant No. 2, Louis P. Vecchiarello)
a.k.a. Luigi Vecchiarello DeRoussi

On this 15th day of October, 1970, came the attorney for the government, and the defendant appeared in person and by his counsel, Leroy Nesbitt and Donald Chaikin, Esquires.

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of

WIRE FRAUD, in violation of 18 U.S. Code, Section 1343, as charged in Counts 1 thru 8;

MAIL FRAUD, in violation of 18 U.S. Code, Section 1341, as charged in Counts 9 thru 13, 15, 19 thru 25, 27 and 28;

UTTERING FORGED DOCUMENTS, in violation of 22 D.C. Code, Section 1401, as charged in Counts 29 thru 37,

and the court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of (footnotes omitted)

FIVE (5) YEARS, pursuant to Title 18, U.S. Code, Section 4208 (a2) on each of Counts 1 thru 8, said sentences to run concurrently by the Count;

FIVE (5) YEARS on each of Counts 9 thru 13, 15, 19 thru 25, 27 and 28, said sentences to run concurrently by the Count but consecutively to sentence on Counts 1 thru 8;

THREE (3) YEARS to TEN (10) YEARS on each of Counts 29 thru 37, said sentences to run concurrently by the Count and concurrently with sentences imposed on Counts 1 thru 8.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Lewis Smith, Jr.
United States District Judge

JUDGMENT AND COMMITMENT

(Defendant No. 3, Anthony V. Vecchiarello)
a.k.a. Neely Vecchiarello, Anthony DeRousa Dante and Anthony DeRosa

On this 15th day of October, 1970, came the attorney for the government, and the defendant appeared in person and by his counsel, Leroy Nesbitt and Donald Chaikin, Esquires.

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of

WIRE FRAUD, in violation of 18 U.S. Code, Section 1343, as charged in Counts 1 thru 7;

MAIL FRAUD, in violation of 18 U.S. Code, Section 1341, as charged in Counts 9, 11, 15 and 19 thru 24;

UTTERING FORGED DOCUMENTS, in violation of 22 D.C. Code, Section 1401, as charged in Counts 35, 36 and 37,

and the court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of (footnotes omitted)

FIVE (5) YEARS, pursuant to Title 18, U.S. Code, Section 4208(a2) on each of Counts 1 thru 7, said sentences to run concurrently by the Count;

FIVE (5) YEARS on each of Counts 9, 11, 15, and 19 thru 24, said sentences to run concurrently by the Count but consecutively to sentence on Counts 1 thru 7;

THREE (3) YEARS to TEN (10) YEARS on each of Counts 35, 36 and 37, said sentences to run concurrently by the Count and concurrently with sentences imposed on Counts 1 thru 8.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ J. Lewis Smith, Jr.
United States District Judge

NOTICE OF APPEAL
(Marino J. Maturo)

Name and address of appellant – Marino J. Maturo, D. C. Jail.

Name and address of appellant's attorney – Leroy Nesbitt, 1140 Connecticut Avenue, N. W., Washington, D. C., and Donald J. Chaikin, 1225 Connecticut Avenue, N. W., Washington, D. C.

Offense – 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 1341 (Mail Fraud); 22 D.C. Code 140 (Uttering Forged Documents); 18 U.S.C. 2 (Aiding and Abetting); 22 D.C. Code 105 (Aiding and Abetting).

Concise statement of judgment or order, giving date, and any sentence –

Count: 1 thru 8, Wire Fraud. 5 years on each Count concurrently.
Count: 9, 10, 11, 13, 15, 19 thru 26 and 28, Mail Fraud. 5 years on each Count concurrently; consecutively. Count: 29 thru 37 w/others tried, 3 to 10 years each Count, concurrently; consecutively, with sentences imposed on Counts 1 thru 8.

Name of institution where now confined, if not on bail – D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

October 15, 1970
Date

/s/ Marino J. Maturo
Appellant

/s/ Leroy Nesbitt and
Donald J. Chaikin
Attorney for Appellant

NOTICE OF APPEAL
(Louis P. Vecchiarello)

Name and address of appellant – Louis P. Vecchiarello, D. C. Jail.

Name and address of appellant's attorney – Leroy Nesbitt, 1140 Connecticut Avenue, N. W., Washington, D. C., and Donald J. Chaikin, 1225 Connecticut Avenue, N. W., Washington, D. C.

Offense – 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 1341 (Mail Fraud); 22 D.C. Code 140 (Uttering Forged Documents); 18 U.S.C. 2 (Aiding and Abetting); 22 D.C. Code 105 (Aiding and Abetting).

Concise statement of judgment or order, giving date, and any sentence –

Count: 1 thru 8, Wire Fraud. 5 years on each Count concurrently. (18 U.S. Code, Section 4208 (a2). Count: 9 thru 13, 15, 19

thru 25, 27 and 28, Mail Fraud. 5 years on each Count concurrently; consecutively. Count: 29 thru 37 w/others tried, 3 to 10 years each Count, concurrently; consecutively, with sentences imposed on Counts 1 thru 8.

Name of institution where now confined, if not on bail – D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

October 15, 1970
Date

/s/ Louis P. Vecchiarello
Appellant

/s/ Leroy Nesbitt and
Donald J. Chaikin
Attorney for Appellant

NOTICE OF APPEAL

(Anthony V. Vecchiarello)

Name and address of appellant – Anthony V. Vecchiarello, D. C. Jail.

Name and address of appellant's attorney – Leroy Nesbitt, 1140 Connecticut Avenue, N. W., Washington, D. C., and Donald J. Chaikin, 1225 Connecticut Avenue, N. W., Washington, D. C.

Offense – 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 1341 (Mail Fraud); 22 D.C. Code 140 (Uttering Forged Documents); 18 U.S.C. 2 (Aiding and Abetting); 22 D.C. Code 105 (Aiding and Abetting).

Concise statement of judgment or order, giving date, and any sentence –

Count: 1 thru 7, Wire Fraud. 5 years on each Count concurrently.
Count: 9, 11, 15, and 19 thru 24, Mail Fraud. 5 years on each Count concurrently and consecutively. Count: 35, 36 and 37 w/others tried, 3 to 10 years each Count, concurrently; consecutively, with sentences imposed on Counts 1 thru 8.

Name of institution where now confined, if not on bail – D. C. Jail.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

October 15, 1970
Date

/s/ Anthony V. Vecchiarello
Appellant

/s/ Leroy Nesbitt and
Donald J. Chaikin
Attorney for Appellant

TRANSCRIPT OF MOTION TO STAY PROCEEDING

1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART vs. MARINO J. MATURO. *Defendant.*	C.A. No. 119-70
COMMISSION ON LICENSURE TO PRACTICE THE HEALING ART vs. LOUIS P. VECCHIARELLO a/k/a LUIGI VECCHIARELLO *Defendant.*	C.A. No. 120-70

Washington, D. C.
March 17, 1970

MOTIONS TO STAY PROCEEDINGS HEREUNDER PENDING TRIAL AND DISPOSITION OF CRIMINAL CASE 1981-69 AND FOR MORE DEFINITE STATEMENT ON BEHALF OF DEFENDANTS
MOTION FOR PRELIMINARY INJUNCTION ON BEHALF OF PLAINTIFF (CONSOLIDATED HEARING)

The above-entitled motions came on for hearing before THE HONORABLE JOSEPH C. WADDY, United States District Judge, sitting in Motions Court No. 2., for consolidated hearing, at 11:15 a.m.

2 APPEARANCES:

On behalf of the Plaintiff:

EDWARD L. CURRY, ESQ.
JOHN EARNEST, ESQ.
Assistant Corporation Counsel
District of Columbia

On behalf of the Defendants:

JOHN ALVIN CROGHAN, ESQ.
Attorney at Law.
109 South Fairfax Street
Alexandria, Virginia

* * * *

4 PROCEEDINGS

THE COURT: If Counsel have no objection, both of these cases can be heard at the same time.

MR. CURRY: Yes, Your Honor.

MR. CROGHAN: No objection.

THE COURT: Very well – you may proceed.

OPENING STATEMENT ON BEHALF OF DEFENDANTS

MR. CROGHAN: If the Court please, my name is John A. Croghan and I represent the defendants in this action.

THE COURT: You are a member of the Bar of this court?

MR. CROGHAN: Yes, Your Honor, I am.

THE COURT: And your address?

MR. CROGHAN: 109 South Fairfax Street in Alexandria, Virginia.

Defendants were indicted in December, Your Honor, for allegedly impersonating doctors of medicine in the District of Columbia. Essentially, the basic charge against both men is that they submitted to the District of Columbia Government false and forged credentials to gain licenses as medical practitioners. So far, no evidence to support these indictments has been produced and thus we are faced with bare unsupported allegations.

On the 15th of January, Corporation Counsel brought a companion and parallel civil suit seeking to rescind or revoke the licenses of defendants to practice medicine. The gravurement of this suit was that defendants had obtained licenses to practice medicine in the District of Columbia on the basis of false and forged documents, so that we have a criminal case and a civil case with practically identical issues involved.

In response, defendants filed motions to stay the proceedings pending the result of the civil case and this morning filed an Opposition to the Motion for Preliminary Injunction which has been filed recently by the District of Columbia Government.

In essence, the civil suit and the criminal action are premised upon the same basic facts. However, the filing of this suit and the attendant motion for injunction opens the way for plaintiff to avail itself of a broad discovery process under the federal rules and to obtain, from the defendants, information which might easily be used in the companion criminal case.

Now, in this case plaintiff has gone beyond that. Plaintiff has issued subpoenas for the attendance in court of the defendants this morning, and they are here, so that this goes beyond the mere realm of discovery which, of course, is still available to plaintiff later, but that is why we have asked the court to stay the civil matter until the criminal trial is over.

In support of this motion and of our position, we would first draw to the Court's attention the statement by Professor Lipton speaking before the Judi-
6 cial Conference of the Sixth Circuit in 1968, and I quote:

> "I believe that the use of the administrative subpena to gather evidence for criminal prosecution violates the Fourth Amendment."

Now he was speaking there of the use of the administrative subpoena. This is a judicial subpoena, of course, but there is no difference so far as this case is concerned.

THE COURT: Was there a criminal subpoena used in this case?

MR. CROGHAN: No, sir – a civil subpoena.

THE COURT: Well, then –

MR. CROGHAN: – it is for the purpose of obtaining information and testimony.

In the case of Silver vs. McCamey, reported at 95 U.S. App. D.C. 318, there was a companion civil case in that matter with respect to which the Court said:

> "We agree with the District Court that due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge which is pending against him; his necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial."

7 THE COURT: But what are you going to do about the Ladrey case?

MR. CROGHAN: Well, I was coming to the Parrott case, sir –

THE COURT: Yes, but in the light of what you just said a moment ago, what is your position on the Ladrey case? The Ladrey case held that the proceedings of the Commission of Licensure can proceed and that the question of the physician losing his license and the question of conviction in a criminal matter were different and separate items.

MR. CROGHAN: But we think that they are very closely related and that, if the defendants are called upon to testify this morning, it would violate the Fourth Amendment. We particularly rely in the case, Your Honor –

THE COURT (Interposing): I am not ruling on that point, of course. I don't know whether they will be called upon to testify or not. Let us argue the motions that are here and if they are called upon to testify, then we can face your objections to their testifying.

MR. CROGHAN: Well, on the main theme, then, we have a case of United States vs. Parrott, 248 Fed. Supp. 196 – a 1965 case in which Judge Gasch presided. In that case, Judge Gasch, of this Court, posted this question at page 199: "May the government, by bringing a parallel civil proceeding, avail it

8 self of the almost unlimited opportunity that a civil litigant has to take extensive depositions of the other party to the civil proceeding and then utilize the fruits of this interrogation and so forth in the preparation of the criminal case?"

The Court continued:

> "A defendant charged with a crime may seek an injunction to prevent a civil proceeding, if his testimony in that proceeding will disclose evidence that may be used against him at the criminal trial. The theory which underlies the granting of such injunction is" –

and quoting Silver:

> "That due process is not observed if an accused person is subjected without his consent to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial, and prejudice his defense in that trial."

Then he pointed out at page 201:

> "That when a witness in an investigation is subpenaed to testify in a civil proceeding, oftentimes the witness is forced to choose among the three horns of the Triceratops, namely, disclosure, contempt or perjury."

and he ended up on page 202 by this mandate:

> "The Court holds that the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution."

We have one further case in support of our motion for a stay of proceedings and that is the Dorsey Offutt case, which is No. 11,466 in the April Term, '52, of the Court of Appeals. This was a criminal contempt proceeding growing out of a long-running vendetta between Judge Holtzoff – whose memory I certainly revere, – and Mr. Offutt. Judge Holtzoff held him in contempt and he was convicted of contempt. The case went up on Appeal and a disbarment or disciplinary proceeding was initiated with the Grievance Committee. The Court of Appeals held that this could not be used or pursued while the criminal case remained on appeal and was under consideration.

We have, therefore, the collective effect of the Parrott case and the Silver and the Offutt cases which would preclude or tend to preclude either of the

defendants offering any testimony this morning but also going beyond that, and supporting our position that this parallel civil case should be suspended in its action until the criminal case is over. The criminal case, I might say, is set for June 8th – it was, in fact, set yesterday.

10 Of course, I might further add that there is the presumption of innocence that goes along with these defendants and that presumption might seriously be disturbed by further the proceedings in this case.

THE COURT: Now, you also have a motion for more definite statement.

MR. CROGHAN: Yes, sir.

THE COURT: Do you want to address yourself to that?

MR. CROGHAN: Would the Court like to hear me on that at this time, or does the Court want to dispose of the first motion?

THE COURT: You may address yourself to the second motion while you are on your feet, sir.

MR. CROGHAN: We have asked the Commission to specify under paragraph one, in what respects the application is false and fraudulent as they have alleged, and in paragraph 2 we ask what allegedly was concealed by the defendants from the plaintiff according to paragraph 6 of the complaint.

In paragraph 3 we have asked the basis upon which it is alleged that the degree of physician-surgeon conferred on defendant in Yucatan and, in the other case in Guadalajara, was false and misleading.

In paragraph 4 we have asked that the government disclose the reasons they state that the evidence filed by defendants in support of application was
11 false and misleading because it certainly does not appear in the complaint.

Paragraph 5 is similar to that.

In paragraph 6 we have asked for a more complete statement as to why defendants did not meet the statutory requirement of good moral character as alleged in paragraph 11 of the complaint.

In paragraph 7 we are asking why they did not meet the statutory requirements to practice the healing art in this jurisdiction.

In paragraph 8 we are asking specifically the reason why it is alleged that defendants knowingly filed false and fraudulent documents with any relation to the facts and. more importantly. in paragraph 9 we have asked what steps the Commission took to investigate these credentials at the time the licenses were issued.

We think we are entitled to this information as a matter of right.

THE COURT: Now in the Case of Ladrey versus the Commission on the Licensure to Practice the Healing Art, Dr. Ladrey raised the issue of the Commission proceedings before there had been a conviction of a felony.

MR. CROGHAN: Yes, sir.

THE COURT: The Court of Appeals, speaking with particular reference to the same section that is applicable here; namely, Section 2-123 of the District of Columbia Code, had this to say:

> "It is insisted that in the event resort may not be had to proceedings under the District of Columbia Code, Section 2-123 (1951) that revocation may be ordered only after conviction for felony. We have pointed to the District of Columbia Code, Section 2-123, which provides that if a licentiate has been convicted in the District Court of the United States for the District of Columbia for any felony, the Court, without further hearing or procedure, may suspend or may revoke the license of the defendant in addition to imposing any other penalty provided by law."

And then the Court continues:

> "This section simply provides an additional remedy for summary action when a licentiate shall here have been convicted of any felony. It is clear that any such conviction is to be deemed to establish, without more, the unfitness of the licentiate to continue to hold a license. The section avoids circuitous duplication in the proceeding."

So the Court there seems to say that these proceedings are parallel proceedings and one need not wait until the other has been disposed of. You might address yourself to that.

MR. CROGHAN: What was the year of that case, may I ask Your Honor?

THE COURT: Well let me look – I ought to know that because I was one of the counsel in it – 1958.

MR. CROGHAN: We respectfully submit, Your Honor, that the Parrott case to some extent supercedes that case because it was squarely held there –

THE COURT: Well Judge Gasch is of this Court and in addition to that, he was not proceeding under the Statute such as we have here.

MR. CROGHAN: But he was stating a broad Constitutional principle, Your Honor, which rises above the Statute, and he squarely said that the Commission, the Government, "may not bring a parallel civil proceeding and thereby avail itself of the civil discovery proceedings to obtain evidence for subsequent criminal prosecution".

Now "discovery" is a broad term, and I take it that in its broadest meaning it would comprehend oral testimony of a witness in the courtroom.

THE COURT: In addition, you have two different plaintiffs here – one is an agency of the District of Columbia and the other is the United States as prosecutor in the other case.

14 MR. CROGHAN: Well, the result would be the same because Mr. Glanzer has been sitting in the courtroom all morning and is evidently here to hear the testimony that is going to be given.

He is the prosecutor.

THE COURT: I see Mr. Glanzer in the courtroom. I did not know he was the prosecutor, but still –

MR. CROGHAN: But it certainly is the holding in that case as well as in Offutt and Silver – they all strongly say that there is a violation of the Fourth Amendment: if the two defendants in this case are going to be called to testify then unswervingly, inevitably, unequivocally, then that testimony would be used against them.

THE COURT: But that is not the issue here; they have not even been called to testify.

You have motions set for today, to stay proceedings and for more definite statement. They have not yet been called upon to testify.

MR. CROGHAN: Yes, but I have cited these two cases – Offutt and Parrott – one in this court and one in the Court of Appeals, and both are posited on the Fourth Amendment and it would be a violation of the Fourth Amendment in the event the proceeding were permitted to go forward because I don't think anyone could say that if it were not for hope that some evidence

15 would be drawn out we would not be here – without the evidence the injunction would be denied pro forma.

THE COURT: Well, I don't know what evidence the Commission intends to present, of course, but, as I say, we are not now faced with this question as to whether the defendants are going to be called upon to testify. If they are called upon to testify you may make your objection and the Court will rule – but right now, we will deal with the motions that are before the Court.

MR. CROGHAN: Well, we think we have presented enough to justify a stay of this proceeding, Your Honor.

THE COURT: I see. Then I will hear from the Government.

MR. CROGHAN: There is one further point I may have left a little obscure in my argument, sir: I think there is no doubt that even though both defendants had been convicted of the offenses charged, so that the Court had full authority to reject or suspend their licenses, the Ladrey case was pitched under Title 2 Section 123, which provides that the United States of America may suspend or revoke and so forth, upon evidence showing to the satisfaction of the Court that the licentiate or registrant has been guilty of misconduct or is professionally incapacitated, and this is not been shown.

THE COURT: Well, this is a proceeding for that purpose, is it not?

16 MR. CROGHAN: We think not in view of the limitations I have mentioned.

THE COURT: Well. it is a proceeding under the Statute for that purpose.

I will hear from the Government.

OPENING STATEMENT ON BEHALF OF THE COMMISSION

MR. CURRY: If it please the Court, my name is Edward L. Curry, Assistant Corporation Counsel, and my address is District Building, 14th and E Streets, N.W.

I am appearing for the plaintiff. Commission in Civil Actions 119-70 and 120-70.

In regard to the motions which defendant has filed for stay of proceedings and more definite statement. I believe that the basic situation here is that the livelihood which the defendants assert they wish to protect derives solely

from the actions of plaintiffs and from the relationship which Defendants undertook to enter with plaintiffs and which is the source of their licenses.

The fact that their conduct, if it is indeed as alleged by plaintiff commission and by the United States of America in another case, would subject them to both license revocation and to criminal prosecution, results solely from their voluntarily entering into a situation which, under the four corners of the Licensing Act, provides both for criminal prosecution and suspension or revocation proceedings.

17 Furthermore, any stay of this action would delay the relief to which the citizens of the District of Columbia are manifestly entitled if plaintiff can show what its complaint alleges, and I do not think that this Court ought to stay the Commission in its proceeding under its responsibility to undo what has been done and what should not have been done – that is to say, the granting of a license to defendants Maturo and Vecchiarello.

Counsel mentioned the case of McCamey versus Silver – I am not personally familiar with that case because it is not cited in the motion for stay of proceedings, but co-counsel advises me that this was a case wherein a taxicab driver was faced with proceedings to suspend or revoke his license to operate his taxicab. He complained of having to testify in that case because of criminal action which was pending against him. The Hackers' Board or whichever authority was hearing the suspension proceeding, said "That's fine; you don't have to testify. However, this proceeding will be suspended and your license will be suspended in the interim, also."

Now that is very close to the situation here. I believe that the cases plaintiff has cited in its Opposition to the motion to stay proceedings, show that the party seeking a stay of proceedings, seeking to hold up the rights of

18 other parties, in order to have relief against them, must show a clear case of hardship. This has not been done.

If there is any issue of Fifth Amendment privileges in the criminal case, Judge Smith has been assigned the criminal case and I am sure he is wholly competent to protect the Defendants' Fifth Amendment rights in the case before him.

THE COURT: And so in this Court in any civil proceeding before it.

MR. CURRY: That is correct.

However, I do not think that the Fifth Amendment privileges have any application in this proceeding. I certainly do not think it applies to enjoin the entire proceeding from going forward, in such a crucial case to the citizens of the District of Columbia and even from the point of view of other jurisdictions who might seek treatment from the individuals here involved who are holding themselves out as physicians and who are licensed as physicians.

The United States attorney has just very kindly handed me the Slip Opinion in United States versus Cordello – this is a Supreme Court Opinion of February 24, 1970, which I have not had time to entirely peruse, but the same issue is raised as to the proceeding of the Government in civil proceedings under the Food and Drug Act while threatening and eventually beginning criminal proceedings under the same Act.

The Supreme Court there did not take the position that is urged upon this Court by counsel for defendants, but ruled that the government was entirely proper in proceeding in a civil action while at the same time proceeding in that action.

As has been noted, the Commission on Licensure is not a party to the criminal prosecution here – it is only a party under its statutory responsibilities and functions concerning the practice of the healing art in the District of Columbia, and specifically Section 123 which gives the Commissioners the responsibility to proceed to seek revocation or suspension in this court.

Moreover, this Court is the only body which can suspend or revoke these licenses and, as long as it stands as the body which has the sole power to grant relief to which plaintiff is entitled, the Court should in our opinion proceed to grant that relief if plaintiff can make the required showing.

I will speak only briefly to the motion for more definite statement. I believe that the cases cited in the Opposition to the motions amply support the proposition that no showing has been made entitling plaintiffs to a more definite statement. The complaint is, in fact, in more detail that the usual complaint filed in this Court.

Defendants make no showing as to why they need a more definite statement but, merely, say "We want more information". The case cited by the government in its opposition involved the same proposition where the motion baldly demanded certain information as to named paragraphs failing to point out the defects complained of in the Complaint, and there the motion was denied.

The case of Tager versus Goodstein is cited at page 2 of the plaintiff's opposition to defendant's motion for more definite statement. Therefore, it is the position of plaintiffs in this case that this case should go forward and that the defendants under investigation be required to answer the Complaint.

Thank you very much, Your Honor.

THE COURT: Do you have any reply to Government's position that you wish to make, Mr. Croghan?

MR. CROGHAN: Only to the limited extent that I would say that the people of the District of Columbia, particularly those of the south-east section, who need medical attention, are not being compromised or injured by the continuance in practice of these two medical practitioners. In the exercise of their

professional functions over the past three years they have seen between three and four thousand patients and to the best of my knowledge and belief, all of these people were satisfied patients, Your Honor. So the District of Columbia is not suffering in any way. In fact, a large segment of the poor population is materially benefitting by their professional skill and adeptness.

THE COURT: With respect to the motion of the defendants in each of these cases, Civil Action 119-70 and 120-70, the motion to stay proceedings pending disposition of the criminal actions is denied. Under the authority of the Ladrey case, to which the Court has referred, the criminal proceeding and the civil proceeding brought by the Commission on Licensure to Practice the Healing Art, are parallel actions and are not mutually exclusive.

With respect to defendants' contention that they may be required in the prosecution of the civil case to reveal matters that would affect them in the criminal prosecution, certainly there are procedures provided for by the Federal Rules of Civil Procedure and the Constitution of the United States, to which they will have access if such became necessary. There are such things as protective orders under the Federal Rules of Civil Procedure and there are such things as constitutional precautions; so therefore the motion to stay the proceeding is denied.

With respect to the motion for more definite statement. this Court finds that the Complaint in each of the cases sets forth the cause of action with sufficient definiteness to enable the defendants to frame an Answer and that the additional details that Defendants wish may be obtained in the course of proceedings under the discovery rules of the Federal rules of civil procedure.

The Motion is therefore denied.

We will now proceed with the Commission's motion for preliminary injunction.

MOTION FOR PRELIMINARY INJUNCTION
ON BEHALF OF THE COMMISSION

MR. CURRY: Would Your Honor prefer a preliminary statement, or shall we proceed?

THE COURT: You may proceed – you have some evidence you wish to present on your motion for preliminary injunction?

MR. CURRY: Yes, Your Honor – I will call Mr. Joseph Sarnello as a witness.

Whereupon

P. JOSEPH SARNELLA

was called as a witness on behalf of the Commission-plaintiff and, having been first duly sworn, was examined by counsel and testified as follows:

DIRECT EXAMINATION

BY MR. CURRY:

Q. What is your full name, please? A. P. Joseph S A R N E L L A.

23 Q. What is your address? A. Home address is 14829 Maidstone Court, Centerville, Virginia.

Q. How are you employed? A. I am employed by the District of Columbia Government – Bureau of Occupations and Professions, as chief of the Licensing Division, at this time.

Q. And what date did you become chief of the Licensing Division? A. In approximately March of 1968.

Q. Before that what position did you hold? A. I was managing analyst for the Bureau of Occupations and Professions from November 1963 through 1968.

Q. Could you tell the Court what was your specific assignment prior to becoming chief of the Licensing Division? A. I was assigned to act as supervisor of the healing art section which processes the medical applications for the District of Columbia. Mr. Foley who had the position for thirty eight years had retired.

Q. What was the date that you became acting supervisor of the healing art section? A. January 1967.

Q. Was there a period before that when you were acting as supervisor of
24 the healing arts section? A. Yes – about forty-five days prior to that – that is, part of November and all of December.

Q. And for how long did you continue to be acting supervisor of the healing arts section? A. Through March of 1968 officially. However, I left the section in December of 1967 and I was on call or standby to help the new supervisor in the event he needed any answers to questions.

Q. Does the jurisdiction of the healing arts section include the processing of applications to practice the healing art in the District of Columbia?

A. Yes, it does.

Q. And at the time that you were acting supervisor of the healing arts section did one Marino Joseph Maturo file an application? A. Yes, he did.

Q. To practice the healing art in the District of Columbia? A. Yes, he did.

Q. Do you recall the approximate date of that application? A. The records show that he filed the application on September 15, 1967.

Q. And during the time you were acting supervisor of the healing art
25 section, did one Louis Peter Vecchiarello file an application to practice the healing art in the District of Columbia? A. Yes, sir – he submitted his application officially on February 14, 1967.

Q. As acting supervisor of the healing art section did you have custody and control of the applications to practice the healing art and evidence submitted in support of those applications? A. Yes, sir.

MR. CURRY: Your Honor, at this point I have a number of documents which I would like to have marked as exhibits for identification only.

MR. CROGHAN: Your Honor, may I suggest that these be done one by one?

THE COURT: He can mark them all at this time for identification purposes.

(Wherepon plaintiff's exhibits 1 through 15 inclusive were marked for identification)

MR. CURRY: Your Honor, at this time I will show plaintiff's exhibits 1 through 15 for identification to Mr. Croghan.

BY MR. CURRY:

Q. I am handing you what has been marked plaintiff's exhibit No. 1 for identification only, and I will ask you to examine that and determine whether or not you can identify that? A. Yes, sir – this is a copy of the original document we received from Dr. Vecchiarello.

THE COURT: Would you keep your voice up.

THE WITNESS: It is a copy of the original application we received from him.

THE COURT: Is there a date on the application?

THE WITNESS: Yes, sir – it shows we received it on February 14, 1967.

BY MR. CURRY:

Q. I hand you next a document marked plaintiff's exhibit No. 2 for identification only, and ask you if you are able to identify that exhibit – would you examine it and state whether or not you are able to identify that document? A. Yes – this is a copy of his diploma which Dr. Vecchiarello submitted.

THE COURT: Take your time and speak into that microphone please.

THE WITNESS: This is a copy of his diploma.

THE COURT: Of who's diploma?

THE WITNESS: Dr. Vecchiarello's.

BY MR. CURRY:

Q. That was also submitted in support of his application to practice the healing art? A. Yes, sir.

27 Q. Next, I hand you an exhibit marked plaintiff's exhibit 3 for identification only, and ask you to examine that and determine whether you can identify it? A. Yes, sir – this is a copy of a document given in response to a letter I wrote to Dr. Vecchiarello, returning his application.

Q. I will hand you the document marked as plaintiff's exhibit 4 for identification only at this time, and ask you whether you are able to identify it? A. Yes – this is a copy of the diploma given to Dr. Vecchiarello from his medical school which he submitted along with his application.

Q. I am handing you a document marked plaintiff's exhibit No. 5 for identification only and ask you to examine that and state whether you can identify it? A. Yes – this is a copy of his transcript of record of secondary school which was submitted along with the application of Dr. Maturo.

Q. Handing you now a document that has been marked as plaintiff's exhibit 6 for identification, would you please examine that and state whether you can identify it? A. Yes – this is a copy submitted by Dr. Maturo in support of his application – this is theoretical and practical tests examination, in Mexico.

Q. I now am handing you a document marked as plaintiff's exhibit 7

28 for identification. Would you examine that and state whether you can identify it? A. Yes – this is an additional transcript from Dr. Vecchiarello from the medical school which was submitted in support of his application.

Q. All right – handing you next plaintiff's exhibit 8 for identification only – would you examine that and state if you can identify it? A. This is a copy of a letter from the Department of Health, Education and Welfare in response to a letter which we submitted for evaluation of Dr. Vecchiarello's credentials.

Q. Now in regard to the application of Dr. Vecchiarello to practice the healing art in the District of Columbia – was a license eventually issued to Dr. Vecchiarello? A. Yes – it was.

Q. Do you recall the date that such license was issued? A. Yes, sir – the record shows that it was issued on July 27, 1967.

Q. During the period of time from the application of Dr. Vecchiarello for a license and the issuance of the license, for which he applied, were you in the position of acting supervisor of the healing art section of the Department of Occupations and Professions? A. Yes, sir.

29 Q. And were you personally familiar with and involved in the procedures from the application up to the point of issuance of the licenses? A. Yes, sir.

Q. Are you familiar with all of the documents which were submitted in support of the application for license? A. Would you repeat that?

Q. Are you familiar. do you have personal knowledge. of all the documents which Dr. Vecchiarello submitted in support of his application for license to practice the healing art? A. Personal knowledge inasmuch as he submitted them to me.

Q. Were any documents submitted by Dr. Vecchiarello which did not come to your attention in the course of your duties as acting supervisor?

A. Not to my knowledge.

Q. I am now handing you plaintiff's exhibit No. 9 marked for identification only and ask you to examine that and state whether you can identify that document? A. Yes – this is a copy of an application submitted to us by Dr. Maturo for a license in the District of Columbia.

Q. And does this document show the date of application? A. Yes, sir – it shows we received it on September 15, 19__ the last number is blocked off but I think it was 1967.

30 Q. Do you have knowledge yourself of when this application was filed?

A. Yes, sir.

Q. What is your best recollection as to that date? A. September 15, 1967.

Q. Handing you now document marked plaintiff's exhibit 10 for identification, would you examine that and state whether you can identify it?
A. Yes, sir – this is a copy of Dr. Maturo's diploma from medical school which he submitted with his application.

Q. I am handing you next document marked plaintiff's exhibit 11 for identification only, and ask you to state whether or not you can identify that?
A. Yes – this is a copy of the school records of Dr. Maturo which he submitted along with his application.

Q. Handing you next a document which has been marked plaintiff's exhibit No. 12 for identification only, would you state whether you can identify that document? A. Yes – this is a copy of his –

Q. Who is "his"? A. I am sorry – Dr. Maturo's professional examination from medical school which was submitted along with his application.

31 Q. I am handing you plaintiff's exhibit 13 for identification – would you examine that and state if you can identify it? A. Yes, sir – this is a copy of the transcript of record of Dr. Maturo from medical school.

Q. Was that also submitted in support of Dr. Maturo's application for license to practice the healing art? A. Yes, sir – it was.

Q. And showing you now plaintiff's exhibit 14 marked for identification only, would you examine that and state whether you can identify it?
A. Yes, sir – this is a copy of his school record which he submitted – which Dr. Maturo submitted along with his application for license, here in the District of Columbia.

Q. All right – and showing you plaintiff's exhibit 15 for identification, would you examine that and state if you can identify it? A. Yes, sir – this is a copy of a letter that we received in response to our inquiry from the

Department of Health Education and Welfare for the evaluation of Dr. Maturo's records and credentials.

Q. Was that in relation to Dr. Maturo's records and credentials, or in relation to the University of Guadalajara? A. Oh – this is sent for evaluation of his records.

MR. CURRY: I will offer plaintiff's exhibit #1 for identification through #15 for identification into evidence at this time.

32 MR. CROGHAN: I have a few questions, Your Honor, on their admissability.

THE COURT: You have questions you would like to ask the witness?

MR. CROGHAN: Yes.

THE COURT: Very well.

VOIR DIRE EXAMINATION

BY MR. CROGHAN:

Q. Is it your testimony that these are duplicates of originals within your custody or under your control? A. Well they are no longer under my control. At the time Dr. Maturo and Dr. Vecchiarello submitted their documents they were notarized copies and certified to be true copies of the original documents.

Q. Were you the custodian of those records at that time? A. Yes, sir – I was.

Q. Are there any more records besides these which have been put in for identification today – are there any additional records – or are these all of them? A. No – as far as I know these are the basis of the documents that were submitted at the time they applied for licensing in the District of Columbia. The original records were subpoenaed by the United States Attor-

33 ney's Office and before we sent out the documents in question our investigations section made a copy of them which I have just identified.

Q. But what I am getting at is this – I suggest to you that these are all the records in respect of these applications and that there are no more.

A. Well – there are letters of recommendation which are in the files that I don't –

MR. CROGHAN: Thank you very much – I have no objection.

(Whereupon plaintiff's exhibits 1 through 15 are admitted into evidence without objection).

DIRECT EXAMINATION (Resumed)

BY MR. CURRY:

Q. Did there come a time when Dr. Maturo had in fact issued to him a license to practice the healing art in the District of Columbia? A. Yes, sir – his license was issued on October 14, 1967 – I am sorry, October 24, 1967.

Q. And during that time were you acting supervisor of the healing art section? A. Yes, sir.

MR. CURRY: I have no further questions.

CROSS EXAMINATION

BY MR. CROGHAN:

34 Q. When you received these various documents in support of the applications of Dr. Louis Vecchiarello and Marino J. Maturo, to practice medicine in the jurisdiction of the District of Columbia, what investigation, if any, did you undertake? A. Well, we secured letters of recommendations that were not submitted with the application. We also submitted the credentials to the Department of Health, Education and Welfare for evaluation and we also wrote to the American Medical Association for a clearance of their files.

Now, if there were any private practice, prior to that, we would have gotten police records but they were not in private practice so far as we were aware.

Q. Now was it your testimony, and is it your testimony, that the Department of Health, Education and Welfare made investigation then? A. No, sir – well they just review the credentials that are submitted to them – what type of investigation they do I am not aware of, sir.

Q. I suggest to you that they made no investigation at all. A. I couldn't answer that. I –

Q. You don't know? A. No.

Q. And what you have described in your testimony a moment ago is what investigation you made? A. Yes, sir.

Q. Were you satisfied with the results of it? A. The Commission Licensure was – yes, sir.

Q. On your recommendation? A. Well I submitted the applications to the Commission, yes, sir.

Q. Did it occur to you that you might want to write to the schools of medicine concerned? A. No, sir – we never did write to the schools, to schools of any type.

Q. You felt completely satisfied without doing so? A. Yes, sir.

Q. And at that time there was absolutely no doubt in your mind that these were valid credentials? A. That is correct.

MR. CROGHAN: Thank you.

MR. CURRY: No redirect, Your Honor.

THE COURT: There is attached to plaintiff's exhibit No. 2 in evidence a document which appears to be different from the identification which was made at the time that the witness was being questioned. Would both counsel take a look at it and see whether that is supposed to be part of the evidence in this case?

MR. CURRY: Counsel can stipulate, Your Honor, that the additional two pages are not part of plaintiff's exhibit 2.

36 THE COURT: Very well – call your next witness.

MR. CURRY: Your Honor, the Commission has no further witnesses. I regret only this morning having submitted affidavits in support of the motion for preliminary injunction, but I beg the Court's indulgence because I was involved in another extensive matter fairly recently and this motion was set for today only last Friday so I was then in a position of having to prepare something at the last minute. Also, of course, counsel for defendants has in fact only today submitted his Opposition to our motion for preliminary injunction so I would ask the Court to consider the affidavits and there are certain portions of the affidavits which I would like to draw to the attention of the Court particularly, in relation to the exhibits which are before the Court.

But we have no further witnesses, Your Honor.

THE COURT: You have nothing further to present on your motion?

MR. CURRY: Nothing further, except to connect the affidavits with the exhibits.

THE COURT: Mr. Croghan?

MR. CROGHAN: May it please the Court: I may be naive about it but it seems to me we are in the same posture that we were in when I entered the courtroom this morning.

THE COURT: Do you have any evidence you wish to put on?

37 MR. CROGHAN: No, sir.

THE COURT: None at all?

MR. CROGHAN: None at all.

THE COURT: All right then. How long would you want to argue, Mr. Curry? The Defendants do not wish to put on any evidence at this time. Therefore we are ready for your argument – how long do you think you would need?

MR. CURRY: I would think half an hour, Your Honor.

THE COURT: And how much time, Mr. Croghan, do you think you would need?

MR. CROGHAN: Ten minutes.

THE COURT: Very well at this time we will recess until 1:45 pm and you may begin your argument at that time.

MR. CURRY: Thank you Your Honor.

(Whereupon, at 12:30 pm the hearing was recessed to be resumed at 1:45 of the same day)

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38 AFTERNOON SESSION

1:45 pm

MR. CROGHAN: Would you resume the stand Mr. Sarnella and please face the Judge when you are testifying.

THE COURT: The court will control the proceedings, Mr. Croghan.

MR. CROGHAN: This is for a special purpose, Your Honor.

Whereupon

P. JOSEPH SARNELLA

resumed the stand, and having been previously duly sworn was examined further as follows:

CROSS EXAMINATION (Continued)

BY MR. CROGHAN:

Q. Mr. Sarnella, you are the same Mr. Samella who testified just before recess are you not? A. Yes, sir.

Q. What did you do immediately after His Honor adjourned the court? A. I started to go out the door.

Q. And did you have any conversation with Mr. Glanzer? A. Yes, sir.

Q. What did Mr. Glanzer say to you and what did you say to him?

A. Well –

39 MR. CURRY: I object to this question – what Mr. Glanzer said to Mr. Sarnella is not relevant to this proceeding.

MR. CROGHAN: This has a distinct bearing on the case, Your Honor.

THE COURT: You may proceed.

THE WITNESS: He stated that my testimony as far as some of the documents, especially the Department of Health, Education and Welfare, was incorrect and when it came to trial in June I'd have to perjure myself.

BY MR. CROGHAN:

Q. Did he say anything else? A. No he just said I should read the documents and know what is in it before I make such statements and not state there that H.E.W. evaluated credentials when in fact all they do is to state whether there is –

Q. Yes, go ahead. A. I was going to state whether it is a school of bonafide higher learning.

Q. Mr. Sarnella, I put it to you, that your testimony insofar as it went was absolutely true insofar as you knew? A. Yes, sir.

MR. CROGHAN: Those are all the questions I have.

THE COURT: Have you any questions of this witness Mr. Curry?

MR. CURRY: Just briefly, Your Honor.

40 REDIRECT EXAMINATION

BY MR. CURRY:

Q. In reference to this conversation between yourself and Mr. Glanzer, did Mr. Glanzer use the word "perjury" as Mr. Croghan did in his examination, or did he use the word "impeach"? A. Perjury – didn't you –?

MR. CURRY: I have no further questions.

MR. CROGHAN: Your Honor, may I ask the Court at this time to instruct the witness that if he has any more threats from any member of the United States attorney's office that it be reported directly to you?

THE COURT: The witness doesn't have to be instructed – the Court has considered the whole matter.

You may step down.

(Whereupon the witness was excused)

THE COURT: Are you ready to proceed, Mr. Curry?

MR. CURRY: Yes, sir.

CLOSING ARGUMENT ON BEHALF OF COMMISSION

BY MR. CURRY: Your Honor has before him exhibits of the plaintiff-Commission Nos. 1 through 15 which have been admitted into evidence without objection.

Your Honor also has before him the affidavits of Mr. Gene E. Anderson and Mr. James L. Tessier, and I might also add that Mr. Anderson has been
41 available and is presently available should the Court have any further inquiry it wishes to make, concerning the matters contained in the affidavits.

However, it is plaintiff's position that the affidavits are sufficient to raise such a serious question as to the validity of the exhibits, all of which were submitted by defendants to plaintiffs in support of their applications to practice the healing art, that the affidavits themselves are sufficient in this case.

To begin with, the affidavits of Mr. Tessier and Mr. Anderson in relation to the defendant Maturo set out in paragraph 4 that Mr. Anderson and Mr. Tessier did in December go there to the University of Guadalajara, and particularly to the offices of Ralphael Garcia de Quevado who was Secretary General of the University and responsible for the safe keeping and accuracy of the records of the university, including the medical school, and that Mr. Quevado

informed Mr. Anderson and Mr. Tessier that during the year 1964 the receipt numbers of the treasury of the university did not reach the number 10,097 and that the numbers do not usually exceed five thousand for any particular year.

MR. CROGHAN: Excuse me – are you reading from the affidavit?

MR. CURRY: I am reading from the affidavit – paragraph 4 of the
42 affidavit of Mr. Tessier. In paragraph 4 of the affidavit of Mr. Anderson, Your Honor, if you will turn to that, referring to certain of the exhibits of plaintiff, particularly, I believe 11, 12, 13 and 14 though perhaps not all of them, it is set forth therein with the English translation thereof which was submitted by Maturo in his application for license, that the fees for the certifications were paid and that the payment is noted in the receipt No. 10097, the year involved being 1964.

In that paragraph of the affidavit which relates to Mr. Quevado, it says that he stated to Mr. Tessier and Mr. Anderson, and Mr. Tessier would so testify, that the ledger receipt number on these documents is not reflected in the records of the university.

Set forth in the fifth and sixth paragraphs of the affidavit of Mr. Tessier and Mr. Anderson is the fact that Mr. Quevado is the custodian of the records called for – the degree record of the University of Guadalajara – wherein would be registered a degree conferred by the University on the dates concerned.

Examination of the plaintiff's exhibit No. 10 which is the diploma purportedly issued to Mr. Maturo by the University of Guadalajara would reveal that the degree is supposed to be registered on page 309 – from the reverse of that page – in the book which contains, which is the register of degrees, and Mr. Quevado called for the degree register and, as paragraph 7 sets forth
43 that register was examined by Mr. Quevado as well as by Mr. Anderson

and Mr. Tessier and no page 309 was found in the register. The last page of the register was 298. On examination of the date when the degrees conferred on the date of February 9th, 1965 were listed, no name of Marino Joseph Maturo was found.

Further during the course of the interview there, as set forth in paragraph 8 of the affidavits, Mr. Quevado stated that the three doctors who purportedly gave the examinations to Mr. Maturo – as set forth in plaintiff's exhibit 12 – Dr. Revas, Dr. Gomes and Dr. Martinez, were unknown to Mr. Quevado as having been employed by the University.

Lastly, referring to Mr. Maturo, on December 16, 1969 Mr. Tessier and Mr. Anderson talked with the Mexican Federal officials, including the commandant of a special group of the federal judicial police, and went to the Direccion General de Professiones, which is the body which is set forth in the application of Mr. Maturo as being the licensing authority in connection with the right to practice the healing art in Mexico, and which is the sole basis of the reciprocity license issuance here, and at that time, pursuant to the request of Mr. Anderson and Mr. Tessier, as well as that of the Mexican officials pres-
44 ent, a search was conducted of the archives which should have contained the records of Mr. Maturo as well as Mr. Vecchiarello. At that time it was reported to the affiants and to the Mexican federal officials present that no record pertaining to Marino J. Maturo could be found as well as no record pertaining to Louis Peter Vecchiarello or Luigi Vecchiarello de Roussi.

THE COURT: Were these licenses granted on the basis of reciprocity or on the basis of education and the submission of a diploma?

MR. CURRY: These licenses were granted on a basis of reciprocity, as one condition, Your Honor. The provisions of the Healing Art Practice Act permit licensing without examination to students who not to students, but

to persons who have a license to practice in other jurisdictions which would give reciprocity to the residents of the District of Columbia on the same, substantially the same basis.

THE COURT: Was any attempt made by the Department to ascertain from the Mexican authorities whether or not these applicants had licenses in Mexico prior to the time they were granted licenses in the District of Columbia?

MR. CURRY: No – I believe the only inquiry was the inquiry to the Department of Health, Education and Welfare. The Commission relied, perhaps improvidently, upon the applicants themselves, inasmuch as the applicants were sworn, they were under Oath. However the Commission is not here, as I have said, solely on its own behalf. It has acted improvidently. There still remains obvious and substantial doubt which I urge upon the Court about these cases – substantial doubt as to whether there are in fact licenses.

THE COURT: Well, in its role of protecting the public do you not think that the Commission should have made some inquiry if it was going to grant licenses on the basis of reciprocity – that it should have made some inquiry initially to Mexico?

MR. CURRY: I agree; I agree. The licenses which have been issued would have been much better never to have been issued – it would have been much better if there had been an investigation which would have resulted in there not having been any licenses issued – there is no question about that. However, we are here now in the situation of March 17, 1970 which unhappily can only be corrected as of March 1970.

It can no longer be corrected by a more thorough investigation which the Commission's Bureau of Occupations and Professions might have conducted and

which it might now conduct in other cases largely as a result of these two licenses which were improvidently issued.

Further, in regard to Mr. Vecchiarello I have already mentioned that the affidavits of Mr. Anderson and Mr. Tessier establish that a search was conducted
46 at their request and at the request of the Mexican federal officials, of the archives of the body which would have the record of the license if there was in fact a license, and the report was that there was no license to be found.

Mr. Tessier and Mr. Anderson, according to the affidavits, on December 18, 1969, interviewed Dr. Humberto Castro Montes de Oca, Secretary of the Faculty of Medicine, University of Yucatan, in his office in the company of the American Consul of Yucatan. Dr. Castro produced and he looked at, or an examination was conducted by him, as well as Mr. Tessier and Mr. Anderson, of a book from the records of the university, in which there would have been recorded the general examination of physicians and surgeons given at the University on May 14, 1964, if any such examination had, in fact, been given.

Mr. Vecchiarello's application was supported by a document – I believe plaintiff's exhibit No. 6 – purporting to show that he was granted an examination on May 14, 1964, and yet the books of the University of Yucatan – which would reflect such examination – have no record of any such examination on May 14, 1964.

Dr. Castro was given copies of the alleged degree conferred on Mr. Vecchiarello allegedly referring to his general examination as physician and surgeon on May 14, 1964.

47 A copy of the purported qualifications allegedly issued to Luigi Vecchiarello on May 28, 1964, was also supplied and all of these have been marked in evidence.

Dr. Castro stated that they were fraudulent as to their form and content.

On the same day Mr. Tessier and Mr. Anderson interviewed Mr. Francisco Repetto Milan, Recorder of the University of Yucatan, whose purported signature appears on the degree which was allegedly conferred on Mr. Vecchiarello on June 23 1964 and Mr. Milan disclaimed that signature as his.

I think, further in regard to this, while we are dealing with two individuals and we do not have the same information in the affidavits as to both, that the Court must consider that these defendants are working together in their offices at 2412 Minnesota Avenue, South-East, and the common elements of their actions in obtaining licenses here involved are such as to really make the totality of what is before the Court and what in the record applies to both of them, even though in a particular instance it may relate to a university which one attended but not the other.

We have two gentlemen in practice together who have a common element of claiming that they went to medical schools in Mexico, applying for licenses within a few months – half a year, of each other and receiving licenses at

48 about the same time, and the common element of their licensing authority in Mexico – Direccione General de Professiones who are unable to find any record when requested to search for such record by the officials.

I think we have made a substantial showing to the effect that on full hearing of this matter there would be available additional evidence and testimony – admittedly difficult to obtain on short notice – but which would be obtained for the full hearing and trial on the merits in these cases and which would show conclusively that Mr. Maturo and Mr. Vecchiarello were not properly granted licenses, that they did not attend Mexican medical schools which they claim to have attended, that they did not have licenses to practice medicine in Mexico, and that the entire basis of their having been granted a license

in the District of Columbia is reciprocity which permits them to forego taking examinations in the District of Columbia and attendance at medical school which is required even above the reciprocity would be shown to have been non-existent and further that we have an opposition here that is so general in its content as to amount to almost no opposition at all.

THE COURT: Well they do say this much and I think with considerable force – that these defendants are dependent upon their practice for their living

49 for their living and that to grant the preliminary injunction at this time would have the effect of stopping them from making a living pending the time when this case would be heard. They do say that.

I think that is a serious consideration the Court must take into account – as to whether or not they may suffer such irreparable damage by the granting of a preliminary injunction that it should be withheld at this time.

MR. CURRY: Well, Your Honor, the question is whether in regard to the damage which they should properly be protected from has been shown by the plaintiffs to be a probability. On the basis of the affidavits, if plaintiff would prevail in a trial on the merits, then defendants in fact are not and would not in fact be entitled to the livelihood of which they speak and to the continuance of that livelihood but they would be entitled to have their licenses revoked, immediately, and the Court only seeks to avoid irreparable harm to those who are continuing to seek medical attention.

THE COURT: I note that your suit was filed on January 15, 1970, but you did not see fit to file the motion for preliminary injunction until March 6. The Public was involved during that period of time.

MR. CURRY: That is true Your Honor, and the reason for that was that it was my thought that it would be better, perhaps, to bring this up on

50 a motion to advance trial rather than by Preliminary Injunction – however

THE COURT: Why is this not the indicated procedure now?

MR. CURRY: The reason this is not the indicated procedure now, Your Honor, is that we have been delayed by the failure of the defendants to file responsive answers to the pleadings.

THE COURT: Well, they have now ten days within which to file those answers because I have overruled their motion for more definite statement.

MR. CURRY: Correct, but before plaintiff filed the motion for preliminary injunction the effect of the motions which are – with all due respect, I submit, frivolous – was to delay this matter and in effect get the benefit of a stay for over a month. It may indeed have been more necessary for the plaintiff to attempt to file a motion for preliminary injunction – more so than had been the case earlier – but I would urge again upon Your Honor the failure of defendants. They do make reference to their livelihood but they have totally failed to rebutt the matters set forth in the complaint – they have totally failed to question the matters contained in the affidavits which go to the very heart of the case, and the complaint of course is a verified complaint –

THE COURT: The affidavits are just filed today, Mr. Curry.

51 MR. CURRY: Correct.

THE COURT: And the Court has not seen them until it was ready to come on the Bench.

MR. CURRY: But the fact is that the defendants who may be presumed to be in custody of the records and certainly could testify to the fact that they were in fact in attendance at schools in Mexico and that they graduated from medical schools in Mexico, and were licensed to practice in Mexico, have totally failed to make any attempt to rebutt what the plaintiff has shown.

As I said earlier, these licenses simply could not have been granted but for the claim of plaintiffs that they had in fact obtained licenses and that licenses had been granted to them by a particular body in Mexico City and yet, when the Assistant United States Attorney and the Postal Inspector went to that body with Mexican officials, the search produced no records pertaining to these defendants.

It should also be noted that if the preliminary injunction should not be granted and plaintiff would prevail at the ultimate hearing in this matter, then defendants will have been permitted to continue practicing when in fact they should not have been permitted to do so.

On the other hand, if the injunction is granted, a hearing is held and by
52 some chance plaintiffs fail to prevail, then defendants are entitled to go right back into business as though they had never been disqualified or enjoined against practicing the healing art.

This is merely a preliminary or a temporary injunction and the ultimate relief which plaintiff seeks must wait for the final hearing of this matter which will of course afford defendants full rights and they may show, or plaintiff may fail to show, they are not entitled to them.

On the basis of the affidavits, the effect of the material in the affidavits, and what we have shown by way of documents and exhibits submitted by defendants in support of their applications to practice the healing art, and on the basis of the testimony, we respectfully request that the motion be granted. Thank you.

MR. CROGHAN: May it please the Court, this morning when I came into the courtroom around nine forty five Mr. Curry handed me this envelope which says "Hand delivered to John L. Croghan, Esq." and in it were four

affidavits, two by Mr. Tessier the postal inspector, and two by Mr. Anderson who is here in the courtroom as assistant to Mr. Glanzer, Assistant United States Attorney.

I notice that this group of affidavits, while delivered to me only this morning, and delivered to the Court only this morning, relate back to a visit in Mex-
53 ico on December 16th, and December 18th in the cities of Mexico, Guadalajara and Yuctan so I certainly think there has been ample opportunity for this matter to have been more elaborately presented before this time.

I would like to make a further comment about these affidavits, Your Honor – they are a studied and shrewd attempt to circumvent the hearsay rule because Mr. Tessier is a constant follower of Mr. Glanzer – I have seen him repeatedly in Mr. Glanzer's presence in the courthouse, and he has been available at all times since December, and certainly Mr. Anderson is available. Now they could have taken the witness stand and testified to the matters that are contained in the affidavits and then every question would have been objectionable as hearsay but there has been a studied and conscious effort on the part of the government to get testimony before this Court as to the validity of these credentials which the doctors have. I am sure the United States Attorney knows about section 3491 of the Criminal Code which makes specific and detailed provision for getting foreign documents authenticated through the process of applying to the Court for a commission to be executed in favor of the consul or ambassador in Mexico and then taking depositions down there where there is an opportunity for cross-examination.

54 Your Honor, in my feeble way, I cannot cross-examine these affidavits and I don't think Your Honor can either. They are ex parte statements and I strongly question their validity – they certainly are self-serving and the collective effect of this has been to ensconce the two defendants in a squalid ambiscade and that is all that it amounts to.

Let us see what evidence is before the Court, discounting and disregarding these affidavits for the moment. Mr. Samella took the stand and he testified that he received their applications and all supporting data and he believed them to be valid. He referred them to H.E.W. for evaluation and insofar as their investigation went they were shown to be valid, too.

So I think we have made a substantial case for denying this preliminary injunction, Your Honor, and I would like to leave a personal thought with Your Honor – as I leave the podium here. There was running through my mind as Mr. Curry was talking the picture of Dr. Maturo's treatment of a woman, a colored woman who had rheumatoid arthritis – hypertension and had been in a wheelchair for ten years – they took her out of that wheelchair and she is walking around today.

Now, is this the skill of a quack? I don't think so, Your Honor.

THE COURT: If that was intended to be an emotional appeal to me, it didn't work. Have you anything else you want to say, Mr. Curry?

55 MR. CURRY: A moment's indulgence, please, Your Honor.

Nothing further Your Honor – thank you.

THE COURT: The motions for preliminary injunction in this case will be held in abeyance and these cases will be advanced for hearing at the earliest possible date after the expiration of ten days, from this date, during which period defendants will have the right to file an Answer.

MR. CROGHAN: Yes, Your Honor – just one comment if I may. I would like to mention to Your Honor that today is the 17th of March and I am scheduled to go on a trip with my family – all seven of us – on the 20th for about 12 days. I will be back on the 4th of April and I would like to

ask that we have that time and perhaps a few days thereafter to prepare. We have had these reservations for about two or three months now.

THE COURT: Well, yes; I have made the order that it is to be advanced to the first available date, after the expiration of the ten days, so I think you would have to make your representations to the Assignment office as to the actual date.

MR. CROGHAN: Thank you very much, Your Honor.

(Whereupon the hearing was concluded)

Transcript certified

/s/ Joan C. Blair
OFFICIAL COURT REPORTED

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,723

UNITED STATES OF AMERICA, *Appellee,*

v.

MARINO J. MATURO, *Appellant,*

No. 24,724

UNITED STATES OF AMERICA, *Appellee,*

v.

LOUIS P. VECCHIARELLO, *Appellant,*

No. 24,725

UNITED STATES OF AMERICA, *Appellee,*

v.

ANTHONY V. VECCHIARELLO, *Appellant.*

Appeals from the United States District Court for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
SEYMOUR GLANZER,
GENE S. ANDERSON,
JEROME WIENER,
Assistant United States Attorneys.

Cr. No. 1981-69

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Whether the trial court erred in denying the motion for severance of defendants.

II. Whether appellants were denied the effective assistance of counsel.

III. Whether appellants were denied a fair and impartial hearing based upon their claims that:

(1) The trial court was biased.

(2) The jury was prejudiced by press coverage of the case.

(3) The trial court improperly instructed the jury.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,723

UNITED STATES OF AMERICA, *Appellee*,

v.

MARINO J. MATURO, *Appellant*.

No. 24,724

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v.

LOUIS P. VECCHIARELLO, *Appellant*,

No. 24,725

UNITED STATES OF AMERICA, *Appellee*,

v.

ANTHONY V. VECCHIARELLO, *Appellant*.

Appeals from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed December 23, 1969, each of the appellants was charged with eight counts of wire fraud (18 U.S.C. § 1343), twenty counts of mail fraud (18 U.S.C. § 1341)[1]

[1] Four of the mail fraud counts, Nos. 14, 16, 17 and 18, were later dismissed on oral motion of the Government (Tr. 779).

and three counts of uttering forged documents (22 D.C. Code § 1401). Appellants Marino Maturo and Louis Vecchiarello both were also charged with six additional counts of uttering forged documents. Trial commenced on June 8, 1970, before the Honorable John Lewis Smith, Jr., sitting with a jury. On June 16, 1970, appellant Maturo was found guilty of eight counts of wire fraud, fourteen counts of mail fraud, and nine counts of uttering forged documents; appellant Louis Vecchiarello was found guilty of eight counts of wire fraud, fifteen counts of mail fraud and nine counts of uttering forged documents; appellant Anthony Vecchiarello was found guilty of seven counts of wire fraud, nine counts of mail fraud and three counts of uttering forged documents. On October 15, 1970, each of the appellants was sentenced to imprisonment for five years on each of the wire fraud counts, to run concurrently; five years on the mail fraud counts, to run concurrently with each other but consecutively to the wire fraud sentences; and three to ten years on the uttering counts, to run concurrently with each other and concurrently with the mail fraud sentences.[2] These appeals followed.[3]

The Offenses

Frank Billovits described appellant Louis Vecchiarello as a "first-class mechanic" in the area of furniture finishing (Tr. 220).[4] Eileen Zalla knew appellant Maturo as a laboratory technician (Tr. 211). Henry Cronkite met appellant Anthony Vecchiarello when Vecchiarello was sales manager for Color World, a retail color television sales company (Tr. 112). These three, the furniture finisher, the technician and the salesman, united in a common scheme

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[2] Appellants incorrectly state that they were sentenced "to serve up to five years" (Appellant's Br. at 3).

[3] The three appeals were consolidated by order of this Court on October 29, 1970.

[4] "Tr." refers to transcript of the trial which began on June 8, 1970; "Pt. Tr." refers to the transcript of the pretrial proceedings held on June 4, 1970.

involving utilization of entirely different skills: they held themselves out to the general public as doctors.

In February 1967 appellant Louis Vecchiarello applied to the District of Columbia Bureau of Occupations and Professions for a license to practice medicine in the District of Columbia, under the local rules of reciprocity, based upon documents indicating that he was a graduate of the Medical School at the University of Yucatan, Merida, Yucatan, Mexico, (Tr. 383, 511). The application was granted on July 27, 1967 (Tr. 392). In September 1967 appellant Maturo also applied for a license to practice medicine based upon documents indicating that he had studied medicine at the University of Guadalajara, Mexico (Tr. 399) and his application was granted on October 24, 1967 (Tr. 403-404). These two appellants then opened an office at 2412 Minnesota Avenue, S.E., representing that they were doctors (Tr. 363). In the middle of 1969, appellant Anthony Vecchiarello applied under the reciprocity rules for a license to practice medicine based upon documents indicating that he too had graduated from the University of Guadalajara Medical School (Tr. 416-417). Business was good, for in October of 1969 appellants opened a branch office at 800 Fourth Street, S.W. Although his application had not yet been granted, appellant Anthony Vecchiarello became the "doctor" in charge of that clinic (Tr. 364-366). These three "men of medicine" were still holding themselves out as doctors, treating patients, performing laboratory tests, diagnosing and prescribing when in 1970 they were arrested and brought to trial (Tr. 755-815).

The Trial

The documents submitted by appellant Louis Vecchiarello to the licensing board indicated that he attended the University of Yucatan Medical School from 1953 to 1957 and from 1961 to 1963.[5] Dr. Humberto Castro, Secretary of the

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[5] These documents included a copy of qualifications issued by the University of Yucatan; results of the theoretical and practical tests taken after graduation

Medical School,[6] testified that he was a student at the school from 1950 to 1958 and that since 1962 he has been a member of the faculty (Tr. 499-501). To his knowledge appellant never attended the school (Tr. 516). Appellant's documents reveal that he allegedly graduated on June 23, 1964; but at that time Dr. Castro taught and examined the students, handled all of their grade and attendance records, and knew every member of the 1964 graduating class. According to Dr. Castro, appellant Louis Vecchiarello was not a member of that or any class (Tr. 516-520). Dr. Castro reviewed the documents which purported to be appellant's transcript, degree and results of professional examination and concluded that all were false (Tr. 517-530). He also reviewed the application for a license submitted by appellant Louis Vecchiarello and testified that the signatures on those documents referring to representatives of the Medical School were false (Tr. 532-533). He produced actual transcripts and examination results and compared the genuine documents with those presented by appellant, showing why appellant's documents had to be fraudulent (Tr. 530-532).

Frank Billovits, the owner of the Elitewood Finishing Company in the Bronx, New York, testified that appellant Louis Vecchiarello was not in Merida during 1961 but rather, from October 1960 to February 1961, was employed as a furniture finisher in his shop (Tr. 218-220). When appellant left, he informed Billovits that he intended to study chiropractic (Tr. 221).

Statements from a deposition taken in a civil suit in Maryland in which appellants Louis Vecchiarello and Marino Maturo were parties[7] were read to the jury (Tr. 697-700). This testimony disclosed that appellant Louis Vecchiarello could not remember any of his professors or any of the textbooks used in his courses (Tr. 697-700).

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from medical school; and a physician and surgeon's degree from the University of Yucatan (Tr. 517-530).

[6] *"Secretary" is a title similar to assistant dean (Tr. 499).*

[7] *Vecchiarello and Maturo v. Eimer*, Civil Action No. 20001, United States District Court, Rockville, Maryland, deposition dated October 27, 1969 (Tr. 685, 689).

Although the documents submitted to the licensing board by appellant Marino Maturo indicated that he studied medicine at the University of Guadalajara from 1959 to 1964 and graduated on February 9, 1965,[8] Dr. Adolfo Preciado-Solis, a fellow in endocrinology at Memorial Hospital for Cancer in New York, testified that he attended medical school at the University of Guadalajara for six years, graduating with a class of about 60 students on February 25, 1965, and that to his knowledge there were no Americans at the medical school during this period. Appellant Maturo was neither in his class nor in any other class in the school (Tr. 572-577). Dr. Solis examined the documents which appellant Maturo had submitted to the licensing board as his diploma and transcript and found them to be falsifications (Tr. 584-587).

Dr. Octavio Diaz Lizarrga and his wife, Dr. Elida Diaz, both testified that they had attended Guadalajara Medical School, Dr. Diaz graduating in 1966 and his wife in 1968 (Tr. 635, 715). Both testified that appellant Maturo was not a student at the school when they were in attendance, and Dr. Octavio Diaz reviewed the documents submitted by appellant and found them all to be false (Tr. 638-650).[9]

The Government then presented testimony as to what appellant Maturo was doing during the years in which he claimed to be in medical school. Mrs. Eileen Zalla, a medical assistant at the University Clinic, Coral Gables, Florida, testified that appellant was employed at that clinic as a laboratory technician when she began work there on July 5, 1961 (Tr. 209-211). She remembered that appellant performed X-rays, blood tests and urinanalyses for the doctors and was employed at the clinic continuously until he terminated during the summer of 1962 (Tr. 212, 217). Mr. Ralph Wugman, Assistant Director of Personnel, Peninsula

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[8] These documents purportedly issued by the University of Guadalajara included a certificate of studies, a certificate of professional examinations, and a degree of physician surgeon (Tr. 584-587).

[9] Dr. Elida Diaz also testified to the procedure for allowing a student to transfer from one medical school to another (Tr. 718).

General Hospital, Edgemere, New York, testified that his records indicated that appellant Maturo was employed at the hospital as an X-ray technician from August 16, 1962, to September 13, 1965 (Tr. 174-178).[10] The employment application filed with Peninsula General Hospital by appellant Maturo indicated that from June 1958 to 1960 he owned his own business in Miami, Florida (Tr. 185-186).[11]

Portions of the deposition from the Maryland civil case [12] were then introduced by the Government. The testimony in the deposition disclosed that appellant Maturo did not remember any of the text books used in his courses, the names of any of his professors or fellow students, or any of the places in Mexico where he had resided (Tr. 689-696). Although all the courses were given in Spanish, he was unable to translate the Spanish appearing on the document that he had submitted to the licensing board as his diploma (Tr. 696-697).[13]

Although the documents presented to the licensing board by appellant Anthony Vecchiarello indicated that he attended the University of Guadalajara from 1961 to 1967,[14] Dr. Solis, Dr. Diaz and his wife all testified that appellant was not a student at the school while they were in attendance there (Tr. 577-578, 650-651, 718-719).

The Government then introduced testimony as to the whereabouts of appellant Anthony Vecchiarello from 1961 to 1968. Through the testimony of Nathan Richardson,

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[10] Appellant Louis Vecchiarello served as an intern at Peninsula General Hospital from December 1964 to December 1965 (Tr. 183). Peninsula did not have an accredited intern program (Tr. 190).

[11] The Government and appellants entered into a stipulation that in November and December 1960 appellant Maturo was before a court in Dade County, Florida (Tr. 788).

[12] See *footnote 7, supra.*

[13] The Government also produced testimony that in 1953 appellant Maturo registered for one course at George Washington University but received no grade and was financially suspended in November 1953 (Tr. 617). He also enrolled for a short period at the University of Miami (Tr. 624-625).

[14] The application and documents were in the name of "Dr. Anthony DeRosa" (Tr. 248). They included a certificate of studies, a certificate of professional examinations, and a degree of physician surgeon (Tr. 251-253).

Anthony Fabianich and Henry Cronkite, friends of appellant, it was established that in 1961 Anthony Vecchiarello was working for a stereo sales company called Capitol Sound, located on Georgia Avenue in the District of Columbia (Tr. 131-132). At that time he called himself "Joe Risi" (Tr. 132).[15] In 1962 he moved into Anthony Fabianich's house for three months and then departed for California, only to return in 1963 (Tr. 133, 325-326).[16] For the next few years, Richardson and Fabianich saw appellant infrequently until appellant took a job with National Commercial Corporation, a burglar alarm company in Bethesda, Maryland, and in 1965 he aided Richardson in obtaining a similar position (Tr. 134). Later Richardson and appellant both transferred to an affiliate which sold water softeners called Nationwide Enterprises (Tr. 136), and in April 1966 Richardson left the firm's employ (Tr. 137).[17] Appellant then took a position with a color television distributor, Color World. After that failed in September 1966, he formed an investment company with Henry Cronkite and in 1967 traveled to Europe seeking capital (Tr. 113-15).[18] Appellant returned to the United States, discarded the investment business idea and looked up his old friend Fabianich (Tr. 330). In June 1968 he and Fabianich journeyed to Mexico City for a pleasure trip. They remained there for about a month until Fabianich left appellant in Mexico and returned home (Tr. 331-334). In February 1969 Fabianich received a call from appellant, who informed him that "from then on he was going to be called Dr. DeRosa" and "he was going to open an office here in Washington." (Tr. 335.)[19]

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[15] Appellant left Capitol's employ for a short period but returned in 1962 (Tr. 132-133).

[16] Appellant once called Fabianich from California and told him that he was running a night spot in Los Angeles (Tr. 326).

[17] Both National Commercial Corporation and Nationwide Enterprises are now defunct (Tr. 41).

[18] During 1967 he had also worked as a salesman for General Developing Corporation, a community development firm (Tr. 160-172).

[19] Fabianich also testified that the document which contained his signature and was submitted by appellant Anthony Vecchiarello to the licensing board

Licensing and Practice

Joseph Sarnella testified that from December 1966 to December 1967 he worked for the Bureau of Occupations and Professions' Commission on Licensure, which is the medical licensing agency for the District (Tr. 382). During this period Sarnella met all three appellants. Appellants Maturo and Louis Vecchiarello had applied for licenses to practice medicine based on their Mexican university training (Tr. 385, 399). Although he had been disbarred in 1962 (Pt. Tr. 10), appellant Anthony Vecchiarello had represented himself as "Neely Vecchiarello, an attorney from New York" (Tr. 390).[20] After both appellants Maturo and Louis Vecchiarello were granted licenses by reciprocity, Sarnella became friendly with them and sought medical advice from them (Tr. 405-411). They even loaned Sarnella money to make a down payment on a new house (Tr. 426). Then, after the investigation into their credentials was initiated, Maturo and Louis Vecchiarello asked Sarnella if he could have the matter "hushed up" (Tr. 494-495).

Richard LaCamera, an accountant, testified that he helped to establish the bookkeeping system for appellants' office at 806 Fourth Street, S.W., and that he observed appellant Anthony Vecchiarello treating patients and allowed appellant Maturo to treat his back problem by injecting cortisone into an area near the spine and left hip (Tr. 360-369).

Max Teitelbaum of the D.C. Department of Health audited the two appellants' records in August 1969 with reference to their billings under the local Medicaid program (Tr. 802-811). He ascertained that appellant Maturo was charging for allergy tests when he was not an authorized allergist. Appellants Maturo and Louis Vecchiarello both were overcharging for services and billing for overlapping charges for the same patient (Tr. 811-812).

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as a character reference was false in that, when he signed it, it contained no statements that appellant ever practiced medicine (Tr. 338).

[20] In 1969, when appellant Anthony Vecchiarello visited the licensing office to get an application for a medical license, he told the clerk, Mr. Coleman, that he was affiliated with the United Nations (Tr. 223).

The Government rested. Appellants did not testify, and the case proceeded to verdict.

ARGUMENT

Introduction

Initially we are compelled to observe that appellants' "Statement of Facts" (Appellants' Br. at 3-5) is replete with unfounded assertions and citations to pages which in no way support the commentary. For example, appellants assert in the "Statement of Facts" that they were "pressured into signing stipulations" (Appellants' Br. at 3) and then cite in support pages which indicate only that freely agreed-upon stipulations were entered into by all counsel and each of the appellants (Tr. 782-793). Appellants then remark that the trial court refused to take judicial notice of a reciprocity agreement and cite transcript pages which reveal only that appellants did not request the court to take judicial notice of anything (see Tr. 833-834). Appellants go on to review the record by relating that their motions for a change of venue were denied at pages 33 and 824 of the transcript. However, a review of these particular pages, and in fact a review of the entire record, will reveal that appellants never made a motion for change of venue.[21] Appellants then continue their "factual summary" by citing page 862 of the transcript as support for the remark that the trial judge was challenged for bias but refused to excuse himself (Appellants' Br. at 4). Again, a perusal of this page indicates that no one commented concerning any bias. Next they relate that the court denied motions before they had been fully made, stating, "The trial judge sought to dissuade co-counsel from representing the appellants with the statements that no future political backing would be accorded counsel and that he would not be paid by the defendants. (See the minutes.)" (Appellants' Br. at 4.) We are astounded at the continual use of such unsup-

[21] We note that appellants did at one point ask for a mistrial based upon an article appearing in the Washington Post (Tr. 206).

ported assertions and submit that, as such, they must be totally disregarded.

I. The trial court did not err in denying the motion for severance of defendants.

Appellants are in error in their assertion that the trial court should have granted their motion for severance since "the joinder to 37 offenses, each, and 111 offenses in toto, was prejudicial to the appellants and in violation of Rule 14 of the Federal Rules of Criminal Procedure." (Appellants' Br. at 7-8.)

Since appellants were charged with joint action in furtherance of a commonly formulated and executed scheme to defraud, judicial economy dictated a joint trial. *United States* v. *Robinson*, —— U.S. App. D.C. ——, ——, 432 F.2d 1348, 1351 (1970). A motion for severance is addressed to the discretion of the trial court, and a denial of such a motion may not be reversed on appeal except where a clear abuse of discretion is evident. *United States* v. *Wilson*, —— U.S. App. D.C. ——, 434 F.2d 494 (1970). Appellants demonstrate no specific prejudice but rely merely on the blanket statement that the vast number of counts against them necessarily required severance so that the jury would not be confused. This assertion is meritless. *See Daly* v. *United States*, 119 U.S. App. D.C. 353, 342 F.2d 932 (1964). Some prejudice almost necessarily results when several defendants are jointly charged with a single or related offenses. Rule 8 (b), FED. R. CRIM. P., permits this sort of prejudice. *Cupo* v. *United States*, 123 U.S. App. D.C. 324, 327, 359 F.2d 990, 993 (1966), *cert. denied*, 385 U.S. 1013 (1967). If it is within the jury's capacity to collate and appraise the evidence relevant to each defendant and no particular likelihood of confusion is evident, then the trial court cannot be said to have abused its discretion in refusing severance. *United States* v. *Kahn*, 381 F.2d 824 (7th Cir. 1967). We can only reflect that those who commit crimes in concert run the risk of being tried together. *Barnes* v. *United States*, 127 U.S. App. D.C. 95, 381 F.2d 263 (1967); *Rhone* v. *United States*, 215 U.S. App. D.C. 47, 365 F.2d 980 (1966).

II. Appellants were not denied the effective assistance of counsel.

(Tr. 13, 22-23, 99, 850, 924-974)

Appellants' claim of ineffective assistance of counsel is based in part upon their lawyers'[22] representations that a Mr. Sherwood would aid in the defense and the subsequent failure of Mr. Sherwood to do so. For support they rely not upon the record but rather only upon their own affidavits submitted in support of their motion for new trial (A18-A24).[23] Since Sherwood was introduced to the court as a tax attorney and member of the Virginia Bar who merely stopped in to observe, and no other mention of Mr. Sherwood is made during the rest of the trial, appellants' claim is contrary to the record and thus deserves no consideration (Tr. 22-23). They also complain of the trial tactics of their attorneys; however, they cite no support for such assertions as "It was equally erroneous to permit one attorney to make the final argument on behalf of the three defendants under the circumstances of the case at bar." (Appellants' Br. at 11).[24] We maintain that counsel's

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[22] Appellants' trial counsel do not represent them on appeal.

[23] "A" refers to the appendix to appellants' brief.

[24] Appellants claim plain error because one attorney represented both appellants Maturo and Louis Vecchiarello (Appellants' Br. at 11). The law does not support them. Where the record does not demonstrate that co-defendants' decision to proceed with one attorney was an informed one, the burden is on the Government to show that any resulting error was harmless. *Ford* v. *United States*, 126 U.S. App. D.C. 346, 379 F.2d 123 (1967); *Lollar* v. *United States*, 126 U.S. App. D.C. 200, 376 F.2d 243 (1967). In the instant case the decision was an informed one since, before the trial began, the court stated in the presence of both appellants Maturo and Louis Vecchiarello, "These gentlemen retained Mr. Menard. He is representing both of them by their own decision." (Pt. Tr. 34.) Neither appellant voiced any objection. In *Campbell* v. *United States*, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965), this Court reversed the conviction of defendant Glenmore but affirmed as to defendant Campbell, reasoning that single representation of both defendants was prejudicial since the Government's case against Glenmore was far weaker than its case against Campbell. In the instant case, however, no prejudice can be demonstrated, since appellants did not present inconsistent defenses and the Government's evidence against both appellant Maturo and Louis Vecchiarello was overwhelming. Appellants' retention of one counsel thus cannot now be a basis for reversal of their convictions. *See Glasser* v. *United States*, 315 U.S. 60, 71 (1942).

decisions as to the most effective manner in which to represent their clients cannot now be the basis for a claim of ineffective assistance of counsel.

In evaluating appellants' claims, we are mindful of the devastating profusion of evidence presented by the prosecution and the consequent difficulties faced by appellants' counsel in rebutting the Government's case. To support their charge of ineffective assistance of counsel, appellants must show that because of counsel's ineptitude there was an absence of judicial character in the trial proceedings or that counsel displayed gross incompetence that blotted out the essence of a substantial defense. *Scott* v. *United States*, 138 U.S. App. D.C. 339, 427 F.2d 609 (1970); *United States* v. *Hammonds*, 138 U.S. App. D.C. 166, 425 F.2d 597 (1970); *Harried* v. *United States*, 128 U.S. App. D.C. 330, 389 F.2d 281 (1967); *Bruce* v. *United States*, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 259 F.2d 787, *cert. denied*, 358 U.S. 850 (1958). Appellants have failed to meet this heavy burden.

The pretrial record (see A14-A17) reveals that counsel for all three appellants made motions to sever and to dismiss all counts, and that both motions were heard and denied on June 4, 1970. At trial, since all three appellants had been charged with a common scheme to defraud, and since the prosecution's case against each individual appellant was similar to that against the others, counsel for appellants chose as a matter of trial strategy to avoid repetition by allowing Mr. Siegal [25] to carry on the majority of the cross-examination and to make a comprehensive closing statement for all three appellants (Tr. 924-974).[26] Appellants even agreed in open court that only Mr. Siegal should make the closing argument (Tr. 850). Such tactical decisions can hardly be classified as ineffective assistance. *Washington* v. *United States*, 134 U.S. App. D.C. 223, 414 F.2d 1119 (1969). In *Mitchell* v. *United States*, *supra*, this

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[25] Mr. Siegal was counsel for appellant Anthony Vecchiarello.

[26] This is not to say that Mr. Menard, counsel for appellants Louis Vecchiarello and Marino Maturo, did not effectively cross-examine or vigorously participate in all bench conferences.

Court had occasion to review claims of ineffective assistance based upon counsel's failure to (1) move for a judgment of acquittal, (2) cross-examine, (3) object to hearsay evidence, and (4) object to a patently erroneous charge to the jury. The Court ruled that these matters pertain solely to the "skill of trial counsel in matters as to which counsel made decisions or would have to make decisions." 104 U.S. App. D.C. at 59, 259 F.2d at 789.

Even the most cursory review of the six-day trial proceedings reveals that counsel for appellants vigorously protected their clients' rights and at all times forced the Government to carry its burden of proof. The trial court even noted that both counsel had, during the preliminary matters and at trial, worked together in the decisions concerning their clients (Tr. 99). Obviously a strategy had been mapped from the outset concerning the manner in which counsel would attack the Government's case. The fact that appellants' guilt was overwhelmingly established by the evidence and that there was no valid defense to the charges does not detract from the conscientious efforts of trial counsel.[27]

III. Appellants were not denied a fair and impartial trial.

(Tr. 25, 27, 33, 38, 43-44, 62-66, 90, 143-144, 194, 206-209, 235-247, 340, 374-375, 380, 469, 595, 601-605, 607, 710-712, 767, 778, 831, 849, 1028, 1038-1040)

Appellants raise a series of arguments in support of their claim that they were deprived of a fair trial. These claims consistently border on the frivolous, and each can be quickly disposed of by brief comment.

(1) ***The trial court was not biased against appellants.***

Appellants claim, without any support in the record, that the trial court was biased. Since they failed to file any timely affidavits and therefore did not follow the require-

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[27] Appellants' claim of "surprise" when they were not called to the stand (Appellants' Br. at 12) is difficult to understand, since counsel announced on the first day of trial in open court, with all appellants present, that appellants would probably not take the stand (Tr. 13).

ments of the very statute which they cite as support, 28 U.S.C. § 144, they are now precluded from raising this issue on appeal. *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 127 U.S. App. D.C. 23, 380 F.2d 570, *cert. denied*, 389 U.S. 327 (1967); *United States* v. *Hanrahan*, 248 F. Supp. 471 (D.D.C. 1965), *aff'd sub. nom. Tynan* v. *United States*, 126 U.S. App. D.C. 206, 376 F.2d 761, *cert. denied*, 389 U.S. 845 (1967); *cf. Laughlin* v. *United States*, 120 U.S. App. D.C. 93, 99-100, 344 F.2d 187, 193-194 (1965).

In any event, such a claim of prejudice in this case is patently absurd. The trial court was examplary in its efforts to insure that appellants received a fair trial. For example, the court, with the aid of the prosecutor, provided full discovery to appellants' counsel (Tr. 90, 143-144, 605); refused to allow the Government to introduce appellants' prior convictions so that they would not be prejudiced (Tr. 469); and questioned appellants separately to insure that they agreed to the stipulations (Tr. 27). A review of the entire record indicates only that the court acted at all times with "judicial evenhandedness," *United States* v. *Barbour*, 137 U.S. App. D.C. 116, 118, 420 F.2d 1319, 1321 (1969); and as a disinterested and objective participant in the proceedings. *United States* v. *McClain*, D.C. Cir. No. 22,652, decided January 27, 1971, slip op. at 7 n. 3.

(2) *The jury was not prejudiced by the press coverage of the case.*

Although appellants urge that their motion for a change of venue should have been granted, we find from the record that they never made such a motion. They are thus precluded from challenging venue on appeal. *United States* v. *Costello*, 381 F.2d 698 (2d Cir. 1967); *Thomas* v. *United States*, 267 F.2d 1 (5th Cir. 1959). Assuming *arguendo* that the issue of venue can be raised, we see no merit in appellants' present claim of error based upon prejudice of the jury through exposure to newspaper and radio coverage of the case. To support their claim, appellants again inaccurately reflect upon the record by urging that jurors were

present in court with "newspapers tucked under their arms (Tr. 33)" (Appellants' Br. at 19). There is no support whatsoever in the record for this statement.

It is well settled that a motion for a change of venue is directed to the sound discretion of the trial court, Rule 21 (a), FED. R. CRIM. P. and defendants who seek a change of venue are presented with a formidable task. *Jones* v. *Gasch*, 131 U.S. App. D.C. 254, 404 F.2d 1231 (1967); *United States* v. *Marcello*, 280 F. Supp. 510, 515 (E.D. La. 1968), *aff'd*, 423 F.2d 993 (5th Cir. 1970). In the instant case, appellants have fallen far short of sustaining their burden.

The court at all times insured that the jurors were free from any prejudicial exposure to radio or news publications. The proceedings followed the guidelines set out in *Jones* v. *Gasch, supra*, to insure that a fair and impartial jury would be chosen. 131 U.S. App. D.C. at 262-263, 404 F.2d at 1238-1239. During the voir dire examination every juror who had previously heard any comment about the case approached the bench and was interrogated by the court and counsel (Tr. 43-44). At the Government's request two jurors who might possibly have been prejudiced were excused by the court (Tr. 38). The jurors were then picked, and appellants chose not to strike two of the individuals who had approached the bench with previous knowledge of the case (Tr. 62-66).[28] During the trial the court kept constant guard lest any publicity influence the jury. At the close of every day the court instructed the jury not to read anything in the papers regarding the trial and not to listen to the radio (Tr. 194, 374-375, 595, 767, 831, 1028). When on two occasions it came to the attention of the court that newspaper articles regarding the case had appeared in the Washington Post, the court asked the jurors if they had read the articles and proceeded with the trial only after it

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[28] These jurors were James Hunt, Juror No. 2, and Ruth E. Kelly, Juror No. 9. We note also that appellants did not exercise all of their peremptory challenges. "If defendant fails to exercise all of his peremptory challenges, he will have a hard time convincing the appellate court that the jurors were prejudiced." 8 MOORE, FEDERAL PRACTICE ¶ 21.03 (2d ed. 1969), citing *United States* v. *Morgan*, 236 F.2d 361 (2d Cir.), *cert. denied*, 352 U.S. 909 (1956).

was satisfied that no prejudice had occurred (Tr. 206-209, 380).[29] Also, the judge requested that the press refrain from printing anything about the past criminal records of any appellant (Tr. 778). Given these efforts by the trial court to avoid prejudice to the jury and no showing by appellants that they were ineffectual, appellants' present contention in our view is insubstantial.

(3) ***The trial court properly instructed the jury.***

Appellants urge that the trail court improperly instructed the jury as to the weight to be given to circumstantial evidence and the standard for reasonable doubt. We agree with appellants that, since they did not object to the court's instruction they are now relegated to a prayer for this Court to find plain error. Rule 52 (b), FED. R. CRIM. P. However, appellants' claim of any error, no less plain error, is shallow at best. They assert that the trial court should have instructed that the jury could find them guilty only after concluding that any reasonable hypothesis of innocence has been excluded by the facts. It is well settled that this is simply not the law. *Howard* v. *United States,* 128 U.S. App. D.C. 336, 389 F.2d 287 (1967) is dispositive:

> Appellant seems to claim, somewhat half-heartedly, that the trial judge should likewise have charged that the jury could not convict on circumstantial evidence unless that evidence necessarily excluded every other hypothesis but guilt. No charge of that type was sought, and it would not have been error to refuse such a request if made. *Howard, supra,* 128 U.S. App. D.C. at 339 n. 1, 389 F.2d at 290 n. 1, citing *Holland* v. *United States,* 348 U.S. 121 (1954); *Curley* v. *United States,* 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied,* 331 U.S. 837. *See also Hunt* v. *United States,* 115 U.S. App. D.C. 1, 316 F.2d 652 (1963).

Next appellants claim that a lesser included offense instruction concerning the altering of diplomas or evidence of graduation in the healing art (2 D.C. Code § 126-130) should

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[29] On both occasions neither defense counsel objected to proceeding with the trial.

have been given. Once again appellants have advanced arguments which ignore the record. Appellants were charged with uttering forged documents; they were *never charged* with forging or altering any document, and therefore a lesser included instruction as to such actions would have been erroneous. *United States* v. *Marcey,* D.C. Cir. No. 22,819, decided February 24, 1971; *see Crosby* v. *United States,* 119 U.S. App. D.C. 244, 339 F.2d 743 (1964).

Appellants now also assert that the court failed to instruct properly on aiding and abetting. Since appellants expressed satisfaction with the court's proposal to give the standard instruction on aiding and abetting[30] (Tr. 849) and made no objection when the instruction was actually given (Tr. 1038-1040), they cannot complain now. *Villaroman* v. *United States,* 87 U.S. App. D.C. 240, 241, 184 F.2d 261, 262 (1950); Rule 30, FED. R. CRIM. P. Assuming *arguendo* that they can nevertheless question the court's instruction, their argument has no merit. They seem to claim that the instruction was improper as to the mail fraud charges because no common criminal venture was established. We cannot agree. One who knowingly participates in the commission of a criminal act thereby aids and abets the principal and is similarly liable. 22 D.C. Code § 105; *see Nye & Nissen* v. *United States,* 336 U.S. 613 (1949). In the instant case the Government produced a plethora of evidence indicating that all three appellants engaged from the beginning in their nefarious scheme to defraud the general public. The evidence against appellants Maturo and Louis Vecchiarello shows that from the inception of the scheme they impersonated medical doctors and later allowed their fellow imposter, Anthony Vecchiarello, to practice medicine in their clinic at 800 Fourth Street, S.W. The evidence against appellant Anthony Vecchiarello also shows his participation from the inception of the scheme, in that he initially represented himself to be a lawyer from New York who wished to aid his brother Louis in obtaining a

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[30] JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, No. 47 (1966).

physician's license by reciprocity (Tr. 340) and later had the audacity to submit his own application to practice medicine to the same agency (Tr. 235-247). The Government's evidence, taken as a whole, overwhelmingly established that all three appellants connived in the scheme which formed the basis for each of the Government's charges.[31]

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[31] Appellants also mistakenly assert that the court failed to instruct that "where the instrument is both forged and uttered by the same person," "there is only the single crime of forgery committed" (Appellants' Br. at 24). Again appellants must be referred to the indictments. They were never charged with forgery, and such an instruction would have been erroneous. Appellants' astounding argument that the court should have *sua sponte* instructed that they could not be convicted if they "acted in good faith in reliance on their licenses" (Appellants' Br. at 32) is unsupported by the record and requires no further comment.

Appellants raise several other claims which in our view are unworthy of more than passing comment.

(1) Appellants claim that the trial court refused to take judicial notice of a reciprocity agreement between the United States and Mexico. The record does not support this assertion; on the contrary, it reveals that the court was never requested to take such notice. Such notice would also have been irrelevant, since the documents appellants presented for reciprocity were not Mexican Government documents but rather were forged purported scholastic documents from universities located in Mexico. No actual foreign documents were presented here, so no reciprocity agreement could affect the prosecution.

(2) Appellants assert that the trial court permitted the Government to suppress evidence beneficial to them by allowing the prosecutor to read statements made at a previous trial while defense counsel was not given the opportunity to read from the same statement. First, appellants are mistaken when they assert that the statements were "EBT's." These statements were part of the testimony at a previous trial (Tr. 607; see footnote 7, *supra*). Second, appellants mistakenly assert that their statements were in evidence by stipulation. They were not. The statements were merely declared competent by stipulation (Tr. 25). Third, although appellants argue that they were refused an opportunity to read to the jury portions of the statement, the record reveals the contrary (Tr. 710-712).

(3) Appellants claim that the trial court should have granted their motions for a mistrial because the prosecutor referred to them by the phrase "also known as." This argument is vacuous.

(4) Appellants' assertion that they were denied Jencks Act statements, 18 U.S.C. § 3500, is totally unsupported by the record. The record indicates that the Government cooperated fully in turning over all material to defense counsel (Tr. 90, 601-605) and that no motions for Jencks material as to witnesses Castro, Solis, or Dr. Diaz and his wife were ever made.

(5) Appellants urge that during the poll the jurors were asked to raise

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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United States Attorney.

JOHN A. TERRY,
SEYMOUR GLANZER,
GENE S. ANDERSON,
JEROME WIENER,
Assistant United States Attorneys.

"their hands if their verdict differed with the forelady's reading of the verdict" (Appellants' Br. at 28). Since appellants did not make a transcript of the jury poll part of the record, it is inappropriate for them now to raise any issue concerning those proceedings. Rule 10(b), FED. R. APP. P.; *see T.V.T. Corp.* v. *Basiliko*, 103 U.S. App. D.C. 181, 257 F.2d 185 (1958).

(6) Appellants' remarks concerning conflict of interest (Appellants' Br. at 35-37) and the use of a rehabilitation testimony (Appellants' Br. at 37-38) are insubstantial.

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